

TRANSCRIPT OF RECORD

Supreme Court of the United States

October Term, 1917

No. 100

JOHN L. LEWIS, ET AL., PETITIONERS,

BENEDICT COAL CORPORATION,

No. 101

UNITED MINE WORKERS OF AMERICA, ET AL.,
PETITIONERS,

BENEDICT COAL CORPORATION,

IN CASE OF BENEDICT COAL CORPORATION
AND IN CASE OF UNITED MINE WORKERS OF AMERICA

FOR THE PETITIONERS, THE UNITED MINE WORKERS OF AMERICA,
AND FOR THE BENEDICT COAL CORPORATION, THE

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UNITED STATES DISTRICT COURT,
Eastern District of Tennessee,
Northern Division.

JOHN L. LEWIS, CHARLES A. OWEN
and JOSEPHINE ROCHE, as Trustee
of the United Mine Workers of Amer-
ica Welfare and Retirement Fund,

v.

THE BENEDICT COAL CORPORA-
TION.

} Docket
No. 2400—
Civil.

Attorneys for Plaintiff:

E. H. Rayson,
R. R. Kramer.

Richard L. Carson,
Grimm, Tapp & Carson,
Greear, Bowen, Mullins & Winston,
Norton, Virginia.

DOCKET ENTRIES.

May 27, 1954 Complaint, filed.

May 27, 1954 Cost Bond, filed.

May 27, 1954 Summons issued and handed U. S. Marshal.

June 7, 1954 Summons returned served on May 28, 1954,
and filed. Lawson, D. M. 2.00.

June 14, 1954 Order granting defendant to July 21, 1954
in which to make defense, entered in Civil
Order Book 10, page 185, and filed.

July 20, 1954 Answer, filed. Copy served by Atty.

July 20, 1954 Cross-claim, filed. Copy served by Atty.

July 27, 1954 Brief on Motion of Defendant, filed. Copy
served by Atty.

Docket Entries

- July 27, 1954 Order allowing plaintiffs to and including August 10, 1954 within which to file brief in reply to Motion and to brief filed by defendant, entered in Civil Order Book 10, page 236, and filed.
- Aug. 10, 1954 Brief of plaintiffs on defendant's Motion concerning venue, filed. Copy served by Attorney.
- Aug. 19, 1954 Order allowing plaintiff 15 days from this date to reply to counterclaim, entered in Civil Order Book 10, page 266, and filed.
- Nov. 1, 1954 Order allowing motion to dismiss for lack of venue and motion for change of venue to be withdrawn, and granting of the transfer of this action, including the cross-claim, to the Northeastern Division of this District, entered in Civil Order Book 10, page 340, & filed.
- Nov. 3, 1954 Summons issued for cross-defendants United Mine Workers of America, Washington, D. C. and United Mine Workers of America, District 28, Norton, Virginia, and handed to U. S. Marshal.
- Nov. 3, 1954 Court File mailed to Clerk, U. S. District Court at Greeneville, Tennessee.
- Nov. 12, 1954 Summons for cross-defendants returned served on November 3, 1954, & filed. (Mailed to Greeneville.) Lawson, D. M. 4.00.

Attest:

A true copy. Certified this Nov. 1, 1956.

BYRON POPE,

Clerk,

By SALLIE M. COCHRAN,

Deputy Clerk.

(Seal)

Statement of Docket Entries

**UNITED STATES DISTRICT COURT,
Eastern District of Tennessee,
Northeastern Division.**

**JOHN L. LEWIS, CHARLES A. OWEN
and JOSEPHINE ROCHE, as Trustees
of the United Mine Workers of Amer-
ica Welfare and Retirement Fund,**

vs.

**THE BENEDICT COAL CORPORA-
TION.**

**No. 944.
Civil.**

STATEMENT OF DOCKET ENTRIES.

- Nov. 4, 1954** Certified copy of order transferring case to the Northeastern Division at Greeneville, Tennessee, filed.
- Nov. 12, 1954** Order allowing plaintiffs until Nov. 24, 1954 in which to reply to the counterclaim asserted against them by defendant, filed, entered Civil Order Book 5, page 350, notice to attorneys by Clerk.
- Nov. 26, 1954** Answer of Plaintiffs to counterclaim, filed copies served by attorneys.
- Nov. 26, 1954** Order, upon application of the cross-defendants and with consent of the cross-plaintiff, Benedict Coal Corporation, the said cross-defendants are granted until December 9, 1954 to make defense to the cross-claim filed against them, filed, entered Civil Order Book 5, page 357, notice to attys.
- Dec. 4, 1954** Amendment to cross claim and demand for trial by Jury, filed, copies served by attys.

Statement of Docket Entries

- Jan. 24, 1955 Order for pretrial filed, copies mailed attorneys.
- Feb. 1, 1955 Order, Richard L. Carson, Esq., one of the attorneys of record for the defendant is allowed to withdraw as one of the attorneys of record for the defendant in this cause, filed. Notice to attorneys by Clerk.
- Feb. 2, 1955 Amendments to the cross-claim filed, copies served by attys.
- Feb. 4, 1955 Defendant & Cross complainants' request for admission, filed, copies served by attys.
- Feb. 4, 1955 Defendant's request for admission, filed, copies served by attys.
- Feb. 7, 1955 Order, by agreement of parties cause continued to Sept. Term 1955, entered in Civil Order Book 5, page 386.
- Feb. 17, 1955 Order, plaintiffs and cross defendants are given until March 1, 1955 within which to make response to the requests for admission filed by Benedict Coal Corporation, filed, entered in Civil Order Book 5, page 390.
- Mar. 1, 1955 Answer of United Mine Workers of America and United Mine Workers of America, District 28, to cross-claim as amended by the First and Second Amendments, filed copies served by attorneys.
- Mar. 1, 1955 Answers of plaintiff to request for admissions, filed, copies served by attys.
- Mar. 1, 1955 Objections of the Plaintiffs to requests numbers Two, Four, Five and Six for admissions, filed, copies served by attorneys.

Statement of Docket Entries

- Mar. 1, 1955 Brief in support of objections to requests for admissions heretofore filed by plaintiff Trustees, filed, copies served by attorneys.
- Mar. 1, 1955 Answers of Cross-Defendants, United Mine Workers of America and United Mine Workers of America, District 28, to requests for admissions filed, copies served by attorneys.
- Mar. 1, 1955 Objections of the Cross-Defendants to requests numbers Thirteen and Twenty-two for admissions, filed, copies served by attys.
- Mar. 1, 1955 Brief in support of objections of the Cross-Defendants to requests numbers Thirteen and Twenty-two for admissions, filed, copies served by attys.
- Mar. 1, 1955 Notice of hearing of objections to requests for admissions filed, copies served by attorneys.
- Apr. 14, 1955 Brief in opposition to objections to requests for admissions filed by the plaintiff Trustees, filed, copies served by attys.
- Apr. 14, 1955 Brief in opposition to objections of the Cross-defendants to requests Numbers Thirteen and Twenty-two for admissions, filed, copies served by attys.
- May 11, 1955 Memorandum of the Court filed, copies mailed attorneys.
- May 11, 1955 Order pursuant to Memorandum this date filed, ordered that John L. Lewis et al., Trustees, respond to defendant's requests for admissions numbered 2, 4, 5, 6; also that United Mine Workers of America and

Statement of Docket Entries

United Mine Workers of America, District 28, respond to defendant's request for admissions numbered 13, but that their objection to requested admission numbered 22, be sustained, filed, entered. Civil Order Book 5, page 454, copies mailed attorneys.

May 23, 1955 Answer of plaintiff to request for admission, filed, copies served by attys.

May 23, 1955 Plaintiffs' Motion to reconsider order with respect to Plaintiffs' objections to requests for Admissions Nos. 4, 5 and 6 filed, copy served by attorneys.

May 23, 1955 Brief in support of Motion to reconsider overruling plaintiffs' objections to requests for admissions 4, 5 and 6, filed, copy served by attorneys.

June 2, 1955 Answer of the Cross-Defendant, United Mine Workers of America and United Mine Workers of America, District 28, to request for admissions filed, copies served by attorneys.

July 8, 1955 Brief in opposition to Motion to Reconsider overruling Plaintiffs' objections to requests for admissions 4, 5 & 6 filed, copy served by attorney.

Aug. 5, 1955 Order overruling plaintiffs' motion for reconsideration of order of May 11, 1955, entered in Civil Order Book 5, page 490, & filed, copies mailed by Clerk.

Aug. 30, 1955 Answer of plaintiffs to requests for admissions 4, 5 and 6 filed, copied served by attorneys.

Statement of Docket Entries

- Sep. 19, 1955 Order, case continued to next regular term of Court, entered in Civil Order Book 5, pg. 510.
- Sep. 22, 1955 Order pursuant to pretrial filed, copies mailed attys. by Clerk.
- Oct. 3, 1955 Exceptions of plaintiff John L. Lewis, Charles A. Owens and Josephine Roche to order pursuant to pretrial filed, copy served by attorneys.
- Oct. 3, 1955 Exceptions of Cross-defendants, United Mine Workers of America and United Mine Workers of America, Dist. 28, to order pursuant to pretrial, filed, copies served by attorneys.
- Oct. 3, 1955 Exceptions of Cross-Plaintiff Benedict Coal Corporation to order pursuant to pretrial, filed copy served by attorneys.
- Nov. 1, 1955 Notice to defendant and Cross-Plaintiff's attorneys of taking of deposition on oral examination, filed, copies served by atty.
- Jan. 26, 1956 Order, defendant and cross-claimant permitted to file further amendment to its cross-claim, cross-defendant granted 20 days in which to file responsive pleading, but nothing in this order shall cause a delay of trial on the merits, filed, entered in Civil Order Book 5, page 588, notice to attorneys.
- Jan. 31, 1956 Third Amendment to the Cross-claim filed, copy served by attorneys.
- Jan. 31, 1956 Trial Brief in behalf of Benedict Coal Corporation filed, notice to attys. by Clerk.

Statement of Docket Entries

- Feb. 2, 1956 Motion for Summary Judgment with affidavit of Josephine Roche and Thomas F. Ryan, Jr., attached, filed, copies served by attys.
- Feb.. 2, 1956 Brief in support of Plaintiffs' Motion for Summary Judgment filed, copy served by attorneys.
- Feb. 2, 1956 Memorandum filed by Plaintiff Trustees of the United Mine Workers of America Welfare and Retirement Fund, filed copy served by attorney.
- Feb. 2, 1956 Trial Brief of cross-defendants United Mine Workers of America and United Mine Workers of America, District 28, filed copy served by attorneys.
- Feb. 13, 1956 Amended pretrial order filed, copies mailed attorneys by Clerk.
- Feb. 16, 1956 Brief in opposition to plaintiffs' Motion for Summary Judgment filed, copies served by attorney.
- Feb. 17, 1956 Motion for summary judgment heard by the Court, sustained in part and overruled in part, entered in Civil Order Book 5, page 604.
- Feb. 22, 1956 Amendment to Answer of cross defendants, filed copy served by atty.
- Mar. 16, 1956 Deposition of James Scott, filed, notice to attorneys by Clerk.
- Mar. 16, 1956 Stipulation filed.
- Mar. 19, 1956 Order of trial by Jury, plaintiffs' evidence and part of defendants' evidence heard, Jury respite to Tuesday, March 20, 1956,

Statement of Docket Entries

at nine A. M. entered in Civil Order Book 5, page 640.

Mar. 20, 1956 Trial continued, further evidence on behalf of defendant heard, Jury respited to 9 A. M., Wednesday, March 21, 1956, entered in Civil Order Book 5, page 642.

Mar. 21, 1956 1 Defendant subpoena returned executed, filed.

Mar. 21, 1956 Trial continued, remainder of defendant's evidence heard, plaintiffs and cross defendants moved the Court for directed verdict in their favor, which motion was overruled by the Court; part of plaintiffs and cross-defendants' evidence heard, Jury respited to Thursday, March 22, 1956, 9 A. M., entered in Civil Order Book 5, page 643.

Mar. 22, 1956 Amendment to cross-claim of Benedict Coal Corporation, filed.

Mar. 22, 1956 Trial continued, remainder of cross-defendants' evidence and cross plaintiff's evidence in rebuttal heard, cross defendants moved the Court to direct a verdict in their favor, which motion was overruled by the Court. Defendant and cross-plaintiff moved the Court for directed verdict in its favor, which motion was overruled by the Court, jury respited to 9 A. M. Friday, March 23, 1956, entered in Civil Order Book 5, page 645.

Mar. 23, 1956 Order of trial continued, argument of counsel, charge of Court and verdict of jury, in suit of Trustees against Benedict Coal Corporation find that plaintiff Trustees are en-

Statement of Docket Entries

titled to recover as unpaid royalties the sum of \$76,504.21, as against this sum find that the defendant Benedict Coal Corporation entitled to a set-off of \$81,017.68. In the cross-action of Benedict Coal Corporation against defendant Unions, verdict is for cross-plaintiff, Benedict Coal Corporation, in the sum of \$81,017.68, entered in Civil Order Book 5, page 645.

- Mar. 23, 1956 Verdict of Jury, filed.
- Mar. 23, 1956 Exhibits 1 to 40, inclusive, filed.
- Apr. 2, 1956 Plaintiffs' Draft of Judgment lodged, copy served by attorneys.
- Apr. 4, 1956 Memorandum in behalf of Benedict Coal Corporation in reference to form of judgment, filed.
- Apr. 4, 1956 Defendant's Draft of Judgment lodged. Copy served by Attorney.
- Apr. 10, 1956 Memorandum in behalf of the plaintiff Trustees of United Mine Workers of America Welfare and Retirement Fund and in behalf of the cross-defendant in reference to judgment filed, copies served by attorneys.
- Apr. 16, 1956 Court's Opinion of Feb. 17, 1956, as transcribed and filed (clerk's copy).
- Apr. 16, 1956 Final Judgment that Benedict Coal Corp. recover the sum of \$81,017.68 from United Mine Workers of America and United Mine Workers of America, District 28, which amount is ordered paid into the registry of the court; final judgment that Trustees have and recover of Benedict Coal Corp. the sum

Statement of Docket Entries

of \$76,504.26, which sum is to be paid out of the deposit in the registry of the Court; that the difference between \$76,504.26 and \$81,017.68 be paid to Benedict Coal Corp., one-half of the court costs to be paid by Benedict Coal Corp. and one-half to be paid by United Mine Workers of America and United Mine Workers of America, District 28, execution awarded, entered in Civil Order Book 5, page 662, & filed. (Notices to Attys. by Clerk. Also copies mailed Attys. by Clerk.)

Apr. 26, 1956 Motion of Benedict Coal Corporation to alter or amend judgment entered April 16, 1956, filed. Copies served by Atty.

Apr. 26, 1956 Motion of cross-defendants, United Mine Workers of America and United Mine Workers of America, District 28, for a new trial filed, copies served by Attys.

Apr. 26, 1956 Motion of plaintiffs to amend judgment filed, copies served by attys.

Apr. 26, 1956 Memorandum in behalf of Trustees' motion to amend judgment filed, copies served by attorneys.

May 2, 1956 Memo in behalf of Benedict's motion to amend the judgment and in opposition to the Trustees' motion to amend the judgment filed, copies served by attys.

July 16, 1956 Memo Brief in support of cross-defendants' motion for a new trial, filed. Copy served by Atty.

Aug. 2, 1956 Brief in opposition to the cross-defendants' motion for a new trial, copy served by Atty.

Statement of Docket Entries

- Aug. 16, 1956** Order overruling and denying motion of Benedict Coal Corporation to alter or amend judgment, filed, entered in Civil Order Book 5, page 700, copies mailed Attys.
- Aug. 16, 1956** Order denying motion of cross-defendants for a new trial, filed, entered Civil Order Book 5, page 700, copies mailed attys.
- Aug. 16, 1956** Order overruling motion of cross-defendants for allowance of interest and for an unconditional judgment, filed, entered Civil Order Book 5, page 700, copies mailed attys.
- Sept. 14, 1956** Order modifying order of the Court entered on Aug. 16, 1956, filed, entered in Civil Order Book 5, page 713.
- Sept. 14, 1956** Notice of Appeal by John L. Lewis, Charles A. Owen and Josephine Roche, Trustees of the United Mine Workers of America Welfare and Retirement Fund to United States Court of Appeals filed, copies served by Attys.
- Sept. 14, 1956** Notice of Appeal by United Mine Workers of America, District 28, cross-defendants to United States Court of Appeals, filed, copies served by Attys.
- Sept. 14, 1956** Supersedeas, Bond in amount of \$85,000.00, filed.
- Sept. 14, 1956** Bond of the United Mine Workers of America Welfare and Retirement Fund for costs on Appeal filed.
- Oct. 17, 1956** Order extending time for filing the record on appeal filed, entered in Civil Order Book 5, page 747. Notice to Attys.
- Nov. 15, 1956** Original Transcript of Testimony, Volumes 1, 2 & 3, filed.

Complaint

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee.

JOHN L. LEWIS, CHARLES A. OWEN
and **JOSEPHINE ROCHE**, as Trustees
of the United Mine Workers of
America Welfare and Retirement Fund,
Plaintiffs,

vs.

THE BENEDICT COAL CORPORATION, a Virginia Corporation,
Defendant.

Civil Action
No.

COMPLAINT.

I.

The plaintiffs are Trustees of the United Mine Workers of America Welfare and Retirement Fund, a charitable trust, with its residence and place of business at 907 Fifteenth Street, Northwest, in Washington of the District of Columbia. Trustee John L. Lewis is a citizen of the State of Illinois. Trustee Charles A. Owen is a citizen of the State of Florida. Trustee Josephine Roche is a citizen of the State of Colorado. The defendant is the Benedict Coal Corporation, a Virginia corporation, with its principal place of business at Room 1224, Hamilton Bank Building, 521 South Gay Street, Knoxville, Tennessee.

II.

The amount in controversy, exclusive of interest and costs, exceeds \$3,000.00.

Complaint

III.

The said Welfare and Retirement Fund was created by contract dated March 5, 1950.

IV.

Between the 5th day of March, 1950, and the 31st day of July, 1953, the defendant was engaged in the business of operating certain coal mines at St. Charles, Virginia. On March 5, 1950, the Virginia Coal Operators Association, of which the defendant was a member, entered into the National Bituminous Coal Wage Agreement of 1950 (a copy of which is attached hereto as Exhibit "A" and made a part hereof by reference) effective the 5th day of March, 1950, under the terms of which the defendant was required to pay unto the United Mine Workers of America Welfare and Retirement Fund the sum of thirty cents (30¢) per ton for each ton of coal produced for use or sale. On the 18th day of January, 1951, the Virginia Coal Operators Association signed the Amendment to the National Bituminous Coal Wage Agreement of 1950, effective February 1, 1951. On the 29th day of September, 1952, the Virginia Coal Operators Association signed the Amendment to the National Bituminous Coal Wage Agreement of 1950, effective October 1, 1952 (a copy of which is attached hereto as Exhibit "B" and made a part hereof by reference), under the terms of which the defendant was required to pay unto the United Mine Workers of America Welfare and Retirement Fund the sum of forty cents (40¢) per ton for each ton of coal produced for use or sale. On December 23, 1952, the defendant signed the National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952 (a copy of which is attached hereto as Exhibit "C" and made a part hereof by reference), effective October 1, 1952, under the terms of which the defendant agreed to pay

Complaint

unto the United Mine Workers of America Welfare and Retirement Fund the sum of forty cents (40¢) per ton for each ton of coal produced for use or sale.

V.

Between March 5, 1950, and September 30, 1952, the defendant produced approximately 459,886.97 tons of coal for use or sale, and as a result thereof, and in accordance with the terms of said contracts referred to in paragraph IV of this complaint, there became due and owing by the defendant to the plaintiffs the sum of \$137,966.09. The defendant made payments on said amount in the sum of \$75,796.79, thereby leaving a balance due and owing by the defendant to the plaintiffs the sum of \$62,169.30, which amount the defendant has neglected or failed to pay.

VI.

Between October 1, 1952, and July 31, 1953, the defendant produced approximately 103,918.29 tons of coal for use or sale, and as a result thereof, and in accordance with the terms of said contracts referred to in paragraph IV of this complaint, there became due and owing by the defendant to the plaintiffs the sum of \$41,567.32. The defendant made payments on said amount in the sum of \$22,290.52, thereby leaving a balance due and owing by the defendant to the plaintiffs the sum of \$19,276.80, which amount the defendant has neglected or failed to pay.

VII.

The plaintiffs have demanded that the defendant pay unto them said sums referred to in paragraphs V and VI, but the defendant refuses and continues to refuse to make payment.

Complaint

Wherefore, plaintiffs pray this Honorable Court grant them judgment against the defendant, the Benedict Coal Corporation, in the sum of \$62,169.30 and an additional sum equivalent to thirty cents (30¢) per ton for all coal produced for use or sale in excess of 459,886.97 tons for the period March 5, 1950, through and including September 30, 1952; and \$19,276.80 and an additional sum equivalent to forty cents (40¢) per ton for all coal produced for use or sale in excess of 103,918.29 tons for the period October 1, 1952, through and including July 31, 1953, with interest and costs of this action.

s/ E. H. RAYSON,

E. H. RAYSON,

s/ R. R. KRAMER,

R. R. KRAMER,

904 Burwell Building,

Knoxville, Tennessee.

VAL J. MITCH,

EDWARD L. CAREY,

HAROLD H. BACON,

KRAMER, DYE, McNABB & GREENWOOD,

Of Counsel.

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee.

JOHN L. LEWIS, CHARLES A.
OWEN and JOSEPHINE ROCHE,
as Trustees of the United Mine
Workers of America Welfare and
Retirement Fund,

Plaintiffs.

vs.

THE BENEDICT COAL CORPORA-
TION, a Virginia Corporation,
Defendant.

Civil Action
No. 2400.

ANSWER.

The Defendant states that this cause was not brought in the proper venue. The Benedict Coal Corporation is a Virginia corporation, and its principal place of business is St. Charles, Virginia, and not Room 1224, Hamilton Bank Building, 521 South Gay Street, Knoxville, Tennessee. The Defendant is not incorporated nor is it licensed to do business in the State of Tennessee. The Defendant is not doing business in the State of Tennessee so as to render itself subject to the jurisdiction of the Courts thereof. Therefore, this Defendant, pursuant to Title 28 U. S. C. A. Section 1406 (a), moves that this cause be dismissed or in the alternative that this cause be transferred to the Western District of Virginia. This Defendant further states that it would be for the convenience of the parties and witnesses and in the interest of justice that such a transfer be made.

Answer

Your defendant further requests that the above defense be heard and determined by this Honorable Court before any other proceedings are had herein.

Not waiving the above objection, the Defendant answers the Complaint as follows:

1. The Defendant is not advised as to the citizenship of the Trustee listed in this cause and calls for strict proof of same. The Defendant, however, states that its principal place of business is not in Knoxville, Tennessee, as alleged, but is in St. Charles, Virginia.
2. The allegations of paragraph 2 of the Complaint are admitted.
3. It is admitted that a Welfare and Retirement Fund was created by contract dated March 5, 1950.
4. The allegations of paragraph 4 of the Complaint are admitted.
5. The defendant does not at this time admit that the complaint correctly sets forth the tonnage produced between March 5, 1950, and September 30, 1952, nor does the Defendant admit owing the balance due as alleged in paragraph 5.
6. The defendant does not admit the tonnage alleged to have been produced between October 1, 1952, and July 31, 1953, nor does Defendant at this time admit the alleged balance due. Defendant believes that the alleged balance due on royalty payments, if owing, are a lesser figure.
7. It is true that the Defendant has not paid to the Plaintiff the alleged royalty for all of the tons of coal produced, but Defendant states that during the last five years

Answer

it has been operating under a contract with the United Mine Workers of America and that the United Mine Workers of America has repeatedly broken this contract to Defendant's damage. The United Mine Workers of America has had numerous unlawful strikes, has refused to arbitrate differences, and this refusal has caused a number of unlawful strikes and these Defendants have been unable to pay the alleged royalties because of the damages suffered by reason of the breach of the contracts by the United Mine Workers of America. That the details of said breaches will be set out in supplemental pleadings and in a cross-claim or counterclaim to be filed in this cause. That during the period of Defendant's operation under contracts with the United Mine Workers of America, the said United Mine Workers of America has caused strikes to be held at Defendant's mines which amounted to secondary boycotts as prohibited by the Labor Management Relations Acts and which strikes further damaged Defendants and made them unable to pay the welfare royalty and the United Mine Workers of America is indebted to the Defendant for the damage done Defendant by the said secondary boycotts, details of which will be hereinafter set out. That the Plaintiff in this action being the beneficiary of a contract entered into between the Defendant and United Mine Workers of America is bound by all the defenses that this defendant may assert against the United Mine Workers of America, and therefore since the United Mine Workers of America by its breaches of contract and by its secondary boycotts has damaged Defendant and made Defendant unable to pay its welfare payments, the Plaintiff in this action is not entitled to recover anything. Furthermore, the United Mine Workers of America is indebted to the Defendant in an amount in excess of any sum that this Defendant may be indebted to the Plaintiff.

Counterclaim

8. Defendant further states that the Plaintiffs are barred from bringing any action on the alleged contract because they have broken the contract themselves and have thwarted the purpose of the contract. The contract sued on specifically provides that one of the purposes of the trust created shall be to make payments from principal or income or both of "(3) benefits on account of sickness, temporary disability, permanent disability, death or retirement", that the Plaintiffs, irrespective of the fact that funds were available, wilfully breached the said contract and failed and refused from and after the .. day of February, 1954, to pay disability benefits to workers covered by the trust.

COUNTERCLAIM.

For further answer and by way of counterclaim your Defendant states that under the said contract sued on, a certain trust fund was created for the benefit of the employees of the Defendant and other coal operators and among these employees for whose benefit the trust was created were certain disabled miners. That one of the stated purposes of the irrevocable trust was to make payments from principal or income or both of "(3) benefits on account of sickness, temporary disability, permanent disability, death or retirement", that the Plaintiffs' Trustees had sufficient funds to make said payments, but irrespective of this fact and in direct violation of the contract the said Plaintiffs' Trustees from and after the .. day of February, 1954, have failed and refused to make these said payments. That since the date of the execution of the contract of March 5, 1950, your Defendant has paid into the fund created by said contract the sum of Ninety-Eight Thousand Eighty-Seven and 31/100 (\$98,087.31) Dollars, Said sum to be used for the stipulated pur-

Counterclaim

poses of the trust. That the Plaintiffs' Trustees have broken the said contract as above set out and have thwarted the purposes of the contract and your defendant, therefore, states and moves this Court that it be permitted to recover back from the Plaintiffs' Trustees the amount which your Defendant has paid into the fund, being the sum of Ninety-Eight Thousand Eighty-Seven and 31/100 (\$98,087.31) Dollars.

Therefore, the Defendant moves this Court to dismiss the Complaint herein and to grant the Defendant judgment against the Plaintiffs in the sum Ninety-eight Thousand Eighty-seven and 31/100 (\$98,087.31) Dollars, together with the cost of this suit.

BENEDICT COAL CORPORATION,

By Counsel.

RICHARD L. CARSON,
900 Burwell Bldg.,
Knoxville, Tenn.

Of Counsel:

GRIMM, TAPP & CARSON,
900 Burwell Bldg.,
Knoxville, Tenn.,

s/ **GREEAR, BOWEN, MULLINS
& WINSTON,**
**GREEAR, BOWEN, MULLINS
& WINSTON,**
Norton, Virginia,
Counsel for Defendant.

Motion

MOTION.

Now comes the Defendant by Counsel and moves this Court for a trial by jury.

BENEDICT COAL CORPORATION,

By Counsel.

RICHARD L. CARSON,

900 Burwell Bldg.,

Knoxville, Tenn.,

GREEAR, BOWEN, MULLINS

& WINSTON,

Counsel for Defendant.

Certificate.

I, Richard L. Carson of Counsel for the defendant, do certify that a copy of the foregoing answer was served on the Plaintiffs by mailing a true copy thereof to E. H. Rayson, Attorney at Law, and R. R. Kramer, Attorney at Law, both of 904 Burwell Building, Knoxville, Tennessee, attorneys for the Plaintiffs, on this 20th day of July, 1954.

RICHARD L. CARSON,

900 Burwell Bldg.,

Knoxville, Tenn.

Order

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee,
Northern Division.

JOHN L. LEWIS, CHARLES A. OWEN
and **JOSEPHINE ROCHE**, as Trustees
of the United Mine Workers of
America Welfare and Retirement Fund,
Plaintiffs,
vs.

BENEDICT COAL CORPORATION,
Defendant.

Civil Action
No. 2400.

ORDER.

This day came the defendant by counsel and moved the Court that it be permitted to withdraw its motion to dismiss the above cause for lack of venue and that it be further permitted to withdraw its motion for change of venue. It appearing to the Court that said withdrawals are agreed upon by the plaintiffs and defendant, it is ordered that said motions be withdrawn as requested.

It being further represented to this Court by counsel for plaintiffs and by counsel for defendant that the parties have agreed that this cause, including the cross-claim, be transferred to the Northeastern Division of this District at Greeneville, Tennessee, and it appearing proper to the Court, it is therefore ordered that the above cause be transferred to the Northeastern Division of the Eastern District of Tennessee at Greeneville, Tennessee.

Upon the allowance of the order permitting the withdrawal of the aforesaid motions and the granting of the

Order

transfer of this action, including the cross-claim, to the Northeastern Division of this District, came the named cross-defendants to the cross-claim heretofore filed in this cause and through their duly authorized counsel agreed to accept service so that the United Mine Workers of America and United Mine Workers of America, District 28, the named cross-defendants to said cross-claim, will stand before this Court in the same manner and to the same extent as if service of process had been duly and lawfully had upon them and each of them in the Northeastern Division of the Eastern District of Tennessee.

The Clerk will issue process for the cross-defendants named in the cross-claim and when process shall have been issued service of same shall be accepted by counsel for the said cross-defendants as per the aforesaid agreement, and service shall be deemed accomplished as the date of such acceptance by counsel.

Enter this the 1 day of November, 1954.

s/ ROBT. L. TAYLOR
District Judge.

This Order is Requested:

s/ R. R. KRAMER,
Counsel for Plaintiffs,

s/ RICHARD L. CARSON,
Counsel for Defendant,
Benedict Coal Corporation,

s/ R. R. KRAMER,
Counsel for Cross-defendants,
United Mine Workers of America
and United Mine Workers of
America, District 28.

Cross-Claim

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee.

**JOHN L. LEWIS, CHARLES A.
OWEN and JOSEPHINE ROCHE,**
as Trustees of the United Mine Work-
ers of America Welfare and Retirement Fund,

Plaintiffs,

vs.

**THE BENEDICT COAL CORPORA-
TION, a Virginia Corporation,**
Defendant.

Civil Action
No. 2400.

CROSS-CLAIM.

Pursuant to Rule 13 (h) Defendants file this, their cross-claim, against the United Mine Workers of America, Washington, D. C., and United Mine Workers of America, District 28, Norton, Virginia, for damages arising out of matters in issue in the above cause and for the grounds of this cross-claim state:

(1)

This cross-claim is brought pursuant to Rule 13 (h) of the Federal Rules of Civil Procedure and pursuant to Title 29, USCA, Sections 185 and 187.

(2)

Cross-complainant is a Virginia corporation with its principal office at St. Charles, Virginia. Cross-complainant is engaged in the operation of coal mines in Lee County, Virginia, and the employees of cross-complainant are members of the United Mine Workers of America. United Mine

Cross-Claim

Workers of America is an unincorporated association or labor organization and has its principal office in Washington, D. C. United Mine Workers of America, District 28, is an unincorporated association and that subordinate part of the United Mine Workers of America in Virginia, with its principal office in Norton, Wise County, Virginia. The United Mine Workers of America has duly authorized officers or agents in the Eastern District of Tennessee and in the Western District of Virginia who are engaged in representing or acting for their employee members therein. United Mine Workers of America, District 28, has such duly authorized officers and agents in the Western District of Virginia. The United Mine Workers of America and United Mine Workers of America, District 28, represent employee members in an industry affecting Interstate Commerce. The Cross-Claimant, Benedict Coal Corporation, has been and is engaged in an industry affecting Interstate Commerce.

(3)

The amount in controversy in this cross-claim, exclusive of interest and cost, exceeds the sum of Three Thousand (\$3,000.00) Dollars.

(4)

Cross-complainant is a member of the Virginia Coal Operators Association of Norton, Virginia, and as such became a party to the National Bituminous Coal Wage Agreement effective March 5, 1950, to June 30, 1952, and the said agreement as amended September 29, 1952, between the United Mine Workers of America and District 28 of United Mine Workers of America and the operating company members of Virginia Coal Operators Association.

(5)

That as a part and parcel of said Bituminous Coal Wage Agreement of 1950 it is provided:

Cross-Claim

The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood. It is the intent and purpose of the parties hereto that this agreement will promote and improve industrial and economic relationship in the bituminous coal industry and to set forth herein the basic agreements covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed in the bituminous coal mines covered by this Agreement.

Settlement of Local and District Disputes.

Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

1. Between the aggrieved party and the mine management.

2. Through the management of the mine and the Mine Committee.

3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

5. Should the board fail to agree the matter shall within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly

Cross-Claim

designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement.

Miscellaneous.

4. The United Mine Workers of America and the operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this Agreement.

In addition to the above provisions from the National Bituminous Coal Wage Agreement of 1950, the plaintiff through the Virginia Coal Operators, Incorporated, is a party to the Virginia District Agreement with the District 28 United Mine Workers of America now in full force and effect. That the said Virginia District Agreement sublimates the National Bituminous Wage Agreement of 1950, with references to the settlements of disputes in this particularity:

The Virginia Coal Operators' Association and the President of District No. 28, United Mine Workers of America, shall mutually select a permanent Umpire to serve with the Arbitration Board in line with the Settlement of Disputes section of the Southern Wage

Cross-Claim

Agreement. This Umpire shall be present at all hearings before the Arbitration Board, and in the event the Board disagrees he shall be empowered to render a decision, and his decision in all cases shall be final.

That pursuant to the above-quoted section of the Virginia District Agreement, Mr. H. E. Tramell of Jellico, Tennessee, has been duly selected and is now serving as permanent umpire with the Arbitration Board to settle disputes that might arise under said contract.

(6)

“The cross-claimant is also signatory to the Appalachian Joint Wage Agreement (dated June 19, 1941) effective April 1, 1941. This Agreement is also sometimes referred to as the Southern Wage Agreement. This Appalachian Joint Wage Agreement as Southern Wage Agreement is referred to in the Virginia District Agreement and contains the following pertinent provisions:”

The management of the mine, the direction of the working force, and the right to hire and discharge are vested exclusively in the Operator, and the United Mine Workers of America shall not abridge these rights. It is not the intention of this provision to encourage the discharge of Mine Workers, or the refusal of employment to applicants because of personal prejudice or activity in matters affecting the United Mine Workers of America. (Page 50)

Settlement of Disputes.

Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute.

Discharge (of) Cases.

When a Mine Worker has been discharged from his employment and he believes he has been unjustly

Cross-Claim

dealt with, it shall be a case arising under the method of settling disputes herein provided. In all discharge cases should it be decided under the rules of this Agreement that an injustice has been dealt the Mine Worker, the Operator shall reinstate and compensate him at the rate based on the earning of said Mine Worker prior to such discharge. Provided, however, that such case shall be taken up and disposed of within five days from date of discharge.

Illegal Suspension of Work.

A strike or stoppage of work on the part of the Mine Workers shall be a violation of this Agreement.
(Page 51)

(7)

That irrespective of the above provisions of the contracts under which cross-complainant was operating, the agents and members of the United Mine Workers of America and the United Mine Workers of America, District 28, during the years 1950 through 1952 called a number of unlawful strikes at the mines of the Benedict Coal Corporation. That during these strikes and previous to these strikes the agents of the said Union would refuse to arbitrate the matters in dispute, would refuse to follow the contractual provisions for adjustments of disputes and would direct, authorize or ratify the strikes by the members of the Union and employees of the Benedict Coal Corporation. That as a result of these unlawful strikes the Benedict Coal Corporation was greatly damaged. The dates of these said strikes and the damages resulting to the Benedict Coal Corporation from each of said strikes were as follows:

Cross-Claim

April 14th and 17th, 1950.....	\$ 4,868.48
July 30th and 31st, 1951.....	2,828.23
October 2nd through 8th, 1951.....	8,253.69
November 2, 6 and 7, 1951.....	4,458.97
February 8 and 9, 1952.....	3,979.14
August 5 and 6, 1952.....	3,174.43
	<hr/>
	\$27,562.94

Therefore Benedict Coal Corporation asks for damages against the United Mine Workers of America and the United Mine Workers of America, District 28, for the sum of \$27,562.94.

(8)

That in addition to the above, Benedict Coal Corporation had heretofore leased certain seams of coal on its property to the Big Mountain Coal Company for the purpose of recovering coal by contour strip mining and augering. The employees of the Big Mountain Coal Company did not belong to the United Mine Workers of America and were unwilling to join the United Mine Workers of America unless they could have their own local. The agents and employees of the United Mine Workers of America and United Mine Workers of America, District 28, tried to organize the workers of the Big Mountain Coal Company and tried to force them to join the said Union and to join the Benedict local. That during this organizing campaign the agents and employees of the said United Mine Workers of America and of its said District 28 called a strike at the mines of the Benedict Coal Corporation and said strike lasted from May 18, 1953, through May 30, 1953.

(9)

This said strike and refusal to work called, incited and encouraged by the agents of the United Mine Workers of America and of its District 28 was unlawful because the

Cross-Claim

purpose of the strike and refusal to work was to force or require the Benedict Coal Corporation to cease doing business with the Big Mountain Coal Corporation, to force and require the employees of the Big Mountain Coal Corporation to become dues-paying members of the United Mine Workers of America against their will and desire and to force or require the Big Mountain Coal Corporation to recognize and bargain with the United Mine Workers and its District No. 28, which had not been certified according to law.

(10)

That as a result of these said unlawful, wilful and malicious acts of the individual members of the United Mine Workers of America and of the agents of the United Mine Workers of America and its District 28, in inducing this strike and refusal to work, cross-complainant was shut down for ten days and lost ten days' profits from its business, cross-complainant was damaged and had to maintain its overhead during that period of time, cross-complainant's business was severely damaged, cross-complainant lost orders for coal and lost future profits on these orders and as a result of all of the above, cross-complainant was damaged to the extent of \$60,000.00.

(11)

That in addition to the above, the Benedict Coal Corporation had formerly engaged one M. M. Campbell, a contractor, to construct a certain slate disposal bin, a tower and cable way. The said contractor, M. M. Campbell, did not employ members of the United Mine Workers of America, and the United Mine Workers of America was not certified to represent his employees. That irrespective of this the agents and members of the United Mine Workers of America and of its District 28 threatened and harassed the employees of M. M. Campbell and called a strike on April 25th and 26th, 1952, in the mines of the

Cross-Claim

Benedict Coal Corporation for the purpose of forcing M. M. Campbell to recognize and bargain with the United Mine Workers of America and its District 28 and to force the employees of the said M. M. Campbell to become dues paying members of the Union against their will. This harassment and strike caused cessation of this work. That as a result of these acts on the part of the members and agents of the United Mine Workers of America and its District 28 and of the strike, the said Benedict Coal Corporation was damaged in the amount of \$20,000.00.

(12)

Because of the aforesaid acts of the agents and members of the United Mine Workers of America and District 28, United Mine Workers of America, and the aforesaid damages, the Benedict Coal Corporation asks for compensatory damages against the said United Mine Workers of America and United Mine Workers of America, District 28, in the amount of \$107,562.94.

(13)

In arbitrarily causing the strikes above set out at the mines of the Benedict Coal Corporation and in damaging the Benedict Coal Corporation, the United Mine Workers of America and United Mine Workers of America, District 28, have utterly disregarded the legal and contractual rights of the cross-complainant and have wantonly, wilfully and maliciously caused and brought about the said strikes and stoppages with the intent to injure the cross-complainant and with a criminal indifference to their legal and civil obligations. Therefore, cross-complainant also asks for punitive and exemplary damages against the United Mine Workers of America and United Mine Workers of America, District 28, in the sum of One Hundred Thousand (\$100,000.00) Dollars.

Therefore, because of the actual damages in the amount of \$107,562.94 as herein set out and for punitive damages

Cross-Claim

in the amount of \$100,000.00, the cross-complainant, Benedict Coal Corporation, asks for judgment against the United Mine Workers of America and United Mine Workers of America, District 28, in the sum of Two Hundred Thousand Seven, Five Hundred Sixty-Two and 94/100 (\$207,562.94) Dollars, together with the costs of this suit, plus interest from the date of accrual of each item of damage. Cross-complainant further moves this honorable court that pursuant to Rule 13 (h) of the Federal Rules of Civil Procedure that the United Mine Workers of America and the United Mine Workers of America, District 28, be made parties to this action and be made to answer this cross-claim.

BENEDICT COAL CORPORATION,

By Counsel.

s/ **RICHARD L. CARSON,**

900 Burwell Bldg.,

Knoxville, Tenn.,

s/ **GREEAR, BOWEN, MULLINS &**

WINSTON,

Norton, Va.,

Counsel for Benedict Coal Corporation,

Norton, Va.

Certificate.

I, s/ Richard L. Carson, of counsel for the defendant, do certify that a copy of the foregoing cross-claim was served on the plaintiffs by mailing a true copy thereof to E. H. Rayson, Attorney at Law, and R. R. Kramer, Attorney at Law, both of 904 Burwell Building, Knoxville, Tennessee, attorneys for the plaintiffs, on this 20th day of July, 1954.

s/ **RICHARD L. CARSON,**

900 Burwell Bldg.,

Knoxville, Tenn.

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Answer of Plaintiffs to Counterclaim

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee,
Northeastern Division.

JOHN L. LEWIS et al.,

Plaintiffs,

vs.

BENEDICT COAL CORPORATION,

Defendant.

Civil Action
No. 2400.

ANSWER OF PLAINTIFFS TO COUNTERCLAIM

For answer to the counterclaim filed against them, plaintiffs say:

I.

They deny that the administration of the Fund in the manner averred in the counterclaim constitutes an adequate basis in law for the relief sought.

II.

They deny that defendant has any legal standing to seek a recovery of any moneys it may have paid into the charitable fund of which plaintiffs are trustees based on allegedly improper administration of the said fund.

III.

For further answer, they admit that one of the purposes of the fund is to make payments of benefits on account of sickness, temporary disability, permanent disability, death or retirement, this purpose being one of the purposes of the fund set forth in the declaration of trust in the National Bituminous Coal Wage Agreement of 1950. They

Answer of Plaintiffs to Counterclaim

deny, however, that payments of the stated type have been stopped as is averred in the counterclaim. Plaintiffs assume that defendant has reference to the fact that effective January 15, 1954, a certain type of disability benefits was eliminated from the benefit program of the fund by the trustees. This action on the part of the trustees is within the discretion of the trustees committed to them by the following language of the aforesaid National Bituminous Coal Wage Agreement of 1950:

Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the "Labor-Management Relations Act, 1947," and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

It is therefore denied that this action constitutes a breach of the aforesaid agreement or of the trust established thereby and it is further denied that the action of the plaintiffs affords defendant a basis in law for its counterclaim.

s/ E. H. RAYSON,

s/ R. R. KRAMER,

904 Burwell Building,

Knoxville, Tennessee,

Attorneys for Plaintiffs.

VAL J. MITCH,

EDWARD L. CAREY,

HAROLD H. BACON,

Washington, D. C.

KRAMER, DYE, McNABB & GREENWOOD,

Knoxville, Tennessee,

Of Counsel.

Amendment to Cross-Claim

I have served a copy of the foregoing answer to counter-claim upon the defendant by mailing copies thereof to Richard Carson, Burwell Building, Knoxville, Tennessee, and Greear, Bowen, Mullins & Winston, Norton, Virginia.

This November 24, 1954.

s/ E. H. RAYSON.

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee.

JOHN L. LEWIS, CHARLES A.
OWEN and JOSEPHINE ROCHE,
as Trustees of the United Mine
Workers of America Welfare and
Retirement Fund,

Plaintiffs,

vs.

THE BENEDICT COAL CORPORA-
TION, a Virginia Corporation,
Defendant.

Civil Action
No. 2400.

AMENDMENT TO CROSS-CLAIM

Comes the cross-claimant, The Benedict Coal Corporation, and before any responsive pleading has been served to its cross-claim filed herein, and amends its cross-claim in the following particulars:

1. By adding at the conclusion of Paragraph 5 of the original cross-claim the following:

"That as part and the parcel of said Bituminous Coal Wage Agreement of 1950, it is provided:

Amendment to Cross-Claim

'Miscellaneous

3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the "Settlement of Local and District Disputes" section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry.'

The National Bituminous Coal Agreement of 1950 was amended September 28, 1952 and the above paragraph 3 was then amended to read as follows:

'Miscellaneous.

3. The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Local and District Disputes" section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts.' "

2. By adding at the conclusion of Paragraph 9 of the original cross-claim the following:

"The acts of the agents and members of the United Mine Workers of America and its District 28 as set out in para-

Amendment to Cross-Claim

graphs 8 and 9 of the original cross-claim, in addition to being violations of the Labor Management Relations Act, were also breaches of the contract then in force between the Benedict Coal Corporation and the United Mine Workers of America and United Mine Workers of America, District 28, the pertinent provisions of which are set out in paragraph 5 of the cross-claim as amended and in paragraph 6 of the cross-claim."

3. By adding at the conclusion of Paragraph 11 of the original cross-claim the following:

"The acts of the agents and members of United Mine Workers of America and of its District 28 as set out in paragraph 11 of the cross-claim, in addition to being violations of the Labor Management Relations Act, were also breaches of the contract then in effect between the Benedict Coal Corporation and the United Mine Workers of America and United Mine Workers of America, District 28, the pertinent provisions of which are set out in paragraph 5 of the cross-claim as amended and in paragraph 6 of said cross-claim."

BENEDICT COAL CORPORATION,

S/ By **S. J. MILLIGAN,**
Counsel.

S/ **S. J. MILLIGAN,**
S/ **S. J. MILLIGAN, Attorney**
Greeneville, Tennessee.

GREEAR, BOWEN, MULLINS & WINSTON,

By S/ **ROBERT T. WINSTON,**
ROBERT T. WINSTON,
Norton, Virginia.

To: John L. Lewis, Charles A. Owen and Josephine Roche, as Trustees of the United Mine Workers of Amer-

Amendment to Cross-Claim

ica Welfare and Retirement Fund; United Mine Workers of America; and United Mine Workers of America, District 28:

Please take notice that the cross-claimant, Benedict Coal Corporation, demands trial by a jury of all of the issues in the above entitled action.

BENEDICT COAL CORPORATION,

S/ By **S. J. MILLIGAN,**
Counsel.

S/ **S. J. MILLIGAN,**
S/ **S. J. MILLIGAN, Attorney,**
Greeneville, Tennessee.

GREEAR, BOWEN, MULLINS & WINSTON,

By **ROBERT T. WINSTON,**
ROBERT T. WINSTON,
Norton, Virginia.

I, S. J. Milligan, of counsel for the cross-claimant, Benedict Coal Corporation, do certify that the foregoing amendment to the cross-claim and demand for trial by a jury of all of the issues in the above entitled action, was served on the plaintiffs and cross-defendants by depositing true copies thereof in the United States mail, postage prepaid, addressed to E. H. Rayson, Attorney at Law, and R. R. Kramer, Attorney at Law, both of 904 Burwell Building, Knoxville, Tennessee, as attorneys for the plaintiffs and cross-defendants, on this 3 day of December, 1954.

S/ **S. J. MILLIGAN,**
S/ **S. J. MILLIGAN,**

Address: **First National Bank Bldg.**
Greeneville, Tennessee.

Amendments to the Cross-Claim

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee.

JOHN L. LEWIS, CHARLES A. OWEN
and JOSEPHINE ROCHE, as Trustees
of the United Mine Workers of America
Welfare and Retirement Fund,

Plaintiffs,

v.

THE BENEDICT COAL CORPORA-
TION, a Virginia Corporation,
Defendant.

Civil Action
No. 2400.

AMENDMENTS TO THE CROSS-CLAIM.

Comes the cross-complainant, the Benedict Coal Corporation, and before any responsive pleading has been served to its cross-claim and amendment filed herein, now further amends its cross-claim in the following particulars:

(a) Delete Paragraph 6 as contained in the original Cross-Claim and substitute therefor the following as Paragraph 6:

The National Bituminous Coal Wage Agreement, effective March 5, 1950, subject to the amendments, modifications and supplements as thereafter provided, carries forward and preserves the terms and conditions of all the various District Agreements executed between the United Mine Workers of America and the various operators and coal associations as they existed on March 31, 1946, and the National Bituminous Coal Wage Agreement dated April 11, 1945. The National Bituminous Coal Wage Agreement dated April 11, 1945, carries forward and preserves the terms and conditions contained in all joint wage agreements effective April 1, 1941 to March 31, 1943, and

Amendments to the Cross-Claim

all of the various District Agreements executed between the United Mine Workers of America and the various coal associations and coal companies as they existed on March 31, 1943, and as amended and supplemented by the agreement therein set out. The Virginia District Agreement that was executed the 13th day of October, 1941, stated that it shall continue in effect until March 31, 1943. A portion of the Virginia District Agreement was as follows:

First: The Southern Wage Agreement concluded in the City of Washington, D. C., on July 5, 1941, is hereby made a part of this Agreement between the United Mine Workers of America, District No. 28, and Virginia Coal Operators Association, Incorporated, on behalf of its members signatory and others signatory hereto.

The Southern Wage Agreement, referred to in the Virginia Wage Agreement, was dated July 5, 1941, and was effective April 1, 1941, to March 31, 1943, and contained the following pertinent provisions:

“The management of the mine, the direction of the working force, and the right to hire and discharge are vested exclusively in the Operator, and the United Mine Workers of America shall not abridge these rights. It is not the intention of this provision to encourage the discharge of Mine Workers, or the refusal of employment to applicants because of personal prejudice or activity in matters affecting the United Mine Workers of America” (page 50).

Settlement of Disputes.

“Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute.”

Discharge of Cases.

“When a Mine Worker has been discharged from his employment and he believes he has been unjustly

Amendments to the Cross-Claim

dealt with, it shall be a case arising under the method of settling disputes herein provided. In all discharge cases should it be decided under the rules of this Agreement that an injustice has been dealt the Mine Worker, the Operator shall reinstate and compensate him at the rate based on the earning of said Mine Worker prior to such discharge. Provided, however, that such case shall be taken up and disposed of within five days from the date of discharge."

Illegal Suspension of Work.

"A strike or stoppage of work on the part of the Mine Workers shall be a violation of this Agreement" (page 51).

(b) Delete Paragraph 7 as contained in the original cross-claim and substitute therefor the following as Paragraph 7:

That irrespective of the above provisions of the contracts under which cross-complainant was operating, the agents and members of the United Mine Workers of America and the United Mine Workers of America, District 28, during the years 1950 through 1953 called a number of unlawful strikes at the mines of the Benedict Coal Corporation. That during these strikes and previous to these strikes the agents of the said Union would refuse to arbitrate the matters in dispute, would refuse to follow the contractual provisions for adjustments of disputes and would direct, authorize or ratify the strikes by the members of the Union and employees of the Benedict Coal Corporation. That as a result of the defendants' refusal to arbitrate the matters in dispute, of their refusal to follow the contractual provisions for adjustment of disputes, of the defendants' refusal to follow those portions of the contracts cited in Paragraphs 5 and 6 of the cross-claim and amendment and because of the resulting strikes, the Bene-

Amendments to the Cross-Claim

Benedict Coal Corporation was greatly damaged. The dates of the strikes for which damages are claimed and the damages resulting to the Benedict Coal Corporation from each of said strikes were as follows:

March 6, 1950.....	\$2,617.81
April 14th and 17th, 1950.....	7,675.50
September 27, 28, 29, 1950.....	4,554.78
January 10 and 11, 1951.....	3,300.00
July 30 and 31, 1951.....	2,717.46
October 2 through 8, 1951.....	11,738.45
November 2, 6 and 7, 1951.....	6,963.76
August 5 and 6, 1952.....	5,754.24
October 16 through 27, 1952.....	12,051.84
January 30, 1953.....	2,030.08

\$59,403.92

Therefore, Benedict Coal Corporation asks for damages against the United Mine Workers of America and the United Mine Workers of America, District 28, for the sum of \$59,403.92.

(c) Delete Paragraph 11 as contained in the original cross-claim and substitute therefor the following as Paragraph 11:

That in addition to the above, the Benedict Coal Corporation had formerly engaged one M. M. Campbell, a contractor, to construct a certain slate disposal bin, a tower and cable way. The said contractor, M. M. Campbell, did not employ members of the United Mine Workers of America, and the United Mine Workers of America was not certified to represent his employees. That irrespective of this the agents and members of the United Mine Workers of America and of its District 28 threatened and harassed the employees of M. M. Campbell and called strikes on February 8, 1952, and on April 25th and 26th, 1952, in the mines of the Benedict Coal Corporation for the purpose of forcing

Amendments to the Cross-Claim

M. M. Campbell to recognize and bargain with the United Mine Workers of America and its District 28 and to force the employees of the said M. M. Campbell to become dues paying members of the Union against their will. This harassment and strike caused cessation of this work: That as a result of these acts on the part of the members and agents of the United Mine Workers of America and its District 28 and of the strike, the said Benedict Coal Corporation was damaged in the amount of \$20,000.00.

(d) Paragraph 12 of the original cross-claim is amended by striking out the sum of \$107,562.94 and adding therefor the sum of \$139,403.92, the same being the amount requested as compensatory damages.

(e) The prayer of the original cross-claim is amended so that it requests compensatory damages in the amount of \$139,403.92 instead of \$107,562.94 and so that it requests total damages in the amount of \$239,403.92 instead of \$207,562.94.

BENEDICT COAL CORPORATION,

By s/ S. J. MILLIGAN,

Counsel.

s/ S. J. MILLIGAN,

S. J. MILLIGAN, Attorney,
Greeneville, Tennessee.

GREEAR, BOWEN, MULLINS & WINSTON,

By s/ ROBERT T. WINSTON,
ROBERT T. WINSTON,
Norton, Virginia.

I, S. J. Milligan, of counsel for the cross-claimant, Benedict Coal Corporation, do certify that the foregoing amendment to the cross-claim and demand for trial by a jury of all of the issues in the above entitled action, was served on the plaintiffs and cross-defendants, by depositing true copies thereof in the United States mail, postage pre-

paid, addressed to E. H. Rayson, Attorney at Law, and R. R. Kramer, Attorney at Law, both of 904 Burwell Building, Knoxville, Tennessee, as attorneys for the plaintiffs and cross-defendants, on this 1 day of February, 1955.

s/ S. J. MILLIGAN,

S. J. MILLIGAN,

Address:

First National Bank Building,
Greeneville, Tennessee.

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee,
Northeastern Division.

JOHN L. LEWIS, et al.,

Plaintiff,

vs.

BENEDICT COAL CORPORATION,

Defendant and
Cross-Plaintiff,

vs.

UNITED MINE WORKERS
OF AMERICA AND UNITED
MINE WORKERS OF AMERICA,
DISTRICT 28,

Cross-Defendants.

Civil Action
No. 2400.

**ANSWER OF UNITED MINE WORKERS OF AMERICA
AND UNITED MINE WORKERS OF AMERICA,
DISTRICT 28, TO CROSS-CLAIM AS AMENDED
BY THE FIRST AND SECOND AMENDMENTS.**

For answer to the cross-claim filed against them, as said cross-claim has been amended by the first and second amendments thereto, the cross-defendants, United Mine

Workers of America and United Mine Workers of America, District 28, say:

I.

For answer to Section 2 of the cross-complaint, it is admitted that cross-complainant is a Virginia corporation with its principal office at St. Charles, Virginia; that cross-complainant is engaged in the operation of coal mines in Lee County, Virginia, and that its employees are members of the United Mine Workers of America; that United Mine Workers of America is an unincorporated association or labor organization with principal office in Washington, D. C. It is further admitted that United Mine Workers of America, District 28, is an unincorporated association with its principal office in Norton, Wise County, Virginia. Said District 28 is chartered by, is under the jurisdiction of and is subject to the laws of the International Union, United Mine Workers of America, the said International Union having supreme legislative, executive and judicial authority over its members and subordinate branches as provided in the Constitution of the International Union, United Mine Workers of America. All other averments of said Section 2 are admitted.

II.

The averments contained in Sections 3 and 4 of the cross-complaint are admitted.

III.

For answer to Section 5 of the cross-complaint, these defendants state that the National Bituminous Coal Wage Agreement of 1950 and said agreement as amended in September, 1952, in their entirety are made exhibits to the original bill of complaint filed in this action and they rely

upon the statements contained in said exhibits for the accuracy of the content thereof. They assume that the quotations found in Section 5 of the cross-complaint are correct quotations from said agreements. It is admitted that the cross-complainant is a party to the so-called Virginia District Agreement of 1941 through its membership in the Virginia Operators Association, but it is denied that the Virginia District Agreement of 1941, as such, is now in full force and effect. The National Bituminous Coal Wage Agreement of 1950 (subject to the amendments, modifications and supplements as hereinafter provided) carries forward and preserves the terms and conditions of the Appalachian Joint Wage Agreement (dated June 19, 1941) effective April 1, 1941 to March 31, 1943, the supplemental six-day work week agreement, the National Bituminous Coal Wage Agreement (dated April 11, 1945) effective April 1, 1945, and all the various District Agreements executed by the United Mine Workers of America and the various coal operators and coal associations (based upon the aforesaid basic agreements) as they existed on March 31, 1946, subject to the terms and conditions of the National Bituminous Coal Wage Agreement of 1950 and as amended, modified and supplemented by said 1950 agreement as therein set out. The cross-defendants are not certain as to the meaning intended in the use of the word "sublimate" as the same appears in said section 5 and therefore neither admit nor deny the designated sublimation of the National Bituminous Coal Wage Agreement of 1950 by the Virginia District Agreement. It is admitted that the provision quoted from the District Agreement in section 5 of the cross-complaint was contained in said agreement and it is further admitted that Mr. H. E. Tramell of Jellico, Tennessee, has been duly selected and is now serving as permanent umpire with the Arbitration Board, which board is provided for in said agreement.

IV.

In answer to section 6 of the cross-complaint, these defendants would show to the Court that the National Bituminous Coal Wage Agreement of March 5, 1950, has heretofore been filed as an exhibit to the original bill of complaint. A copy of the National Bituminous Coal Wage Agreement of April 11, 1945, is attached hereto and marked Exhibit 1 to this answer. For the content and effectiveness of the various provisions of said National Bituminous Coal Wage Agreements, these defendants rely upon the language contained in the agreements themselves. These defendants admit the accuracy of the quotation from the Virginia District Agreement. The quotations from the Southern Wage Agreement are denied inasmuch as the quoted provisions are not set forth in their entirety. The said Southern Wage Agreement is attached hereto as Exhibit 2 to this answer. If the content of said agreement becomes material these cross-defendants will rely upon the language contained in said agreements. It is denied that the provisions of the Southern Wage Agreement which are purported to be copied into section 6 of the cross-complaint were in effect and binding upon the parties in this litigation at the time of the occurrences which are made the basis of this litigation.

V.

In answer to section 7 of the cross-complaint as amended, these defendants admit that there were certain work stoppages at the mines of the cross-complainant during the years 1950 through 1952. The defendants are not advised of whether the dates averred in this section of the cross-complaint are the correct dates and periods of such work stoppages and if said dates and periods become material, these defendants demand full and complete proof thereof.

Answer of United Mine Workers of America, etc.

These defendants deny that there was any wrongful or unlawful conduct on the part of either of them in connection with such work stoppages and specifically deny that the cross-complainant is entitled to recover of either or both of these cross-defendants the sum averred in this section of the cross-complaint or any other sum as damages because of said work stoppages. They specifically deny that they or either of them or their agents "called", caused, authorized, directed or ratified strikes at the mines of the cross-complainant or that they disregarded any contractual provisions, including provisions relating to arbitration, in regard thereto.

VI.

In answer to section 8 of the cross-complaint, these cross-defendants state that they have been advised that cross-complainant did lease a certain portion of its coal lands or certain seams of coal on its property to the Big Mountain Coal Company but these defendants have no specific knowledge of the date, the terms, or conditions of such lease or leases and if the same become material to the issues involved in this litigation, full and complete proof thereof is required.

It is admitted that a work stoppage occurred at the mines of the cross-complainant on or about May 18, 1953, but denies that it continued until on or about May 30, 1953. The averment that these defendants or either of them or their agents and employees were the cause of such work stoppage is denied.

VII.

In answer to section 9 of the cross-complaint, as amended, these cross-defendants deny that the agents of the United Mine Workers of America and its District 28

Answer of United Mine Workers of America, etc.

called, incited or encouraged any strike or refusal to work on the part of the employees of the Benedict Coal Corporation, and, also deny that the purpose of any such strike and refusal to work was to force or require the Benedict Coal Corporation to cease doing business with the Big Mountain Coal Corporation or to force and require the employees of the Big Mountain Coal Corporation to become dues paying members of the United Mine Workers of America against their will and desire, or to force or require the Big Mountain Coal Corporation to recognize and bargain with the United Mine Workers of America and its District 28.

These cross-defendants further deny that they or any of their authorized representatives were guilty of any unlawful or wrongful conduct in connection with said work stoppage.

VIII.

In answer to section 10 of the cross-complaint, these cross-defendants deny that the aforesaid work stoppage of May 18 was due to any unlawful, willful or malicious acts on the part of either of them or their agents and further deny that cross-complainant was damaged to the extent of \$60,000.00 or in any other amount as a result of any unlawful or wrongful conduct on the part of either of them or their agents.

IX.

In answer to section 11 of the cross-complaint as amended, these cross-defendants state that they are advised that the cross-complainant did engage one M. M. Campbell as an independent contractor to perform certain construction work for cross-complainant but the terms and conditions of such contract are not familiar to these cross-

Answer of United Mine Workers of America, etc.

defendants and if the same become material to this litigation, strict proof thereof is demanded. These defendants further admit that the cross-defendant United Mine Workers was not certified as the bargaining agent for the employees of said M. M. Campbell.

All other averments contained in said section of the cross-complaint are denied.

X.

In answer to section 12 of the cross-complaint as amended, these defendants say that cross-complainant is not entitled to recover from them or either of them the sum of \$139,403.92 or any other amount.

XI.

In answer to section 13 of the cross-complaint, these defendants deny that they have wantonly, willfully or maliciously caused or brought about any unlawful strikes or work stoppages in connection with the operation of the cross-complainant's mine and further deny that they have disregarded any contractual or legal rights of the cross-complainant or have violated any obligations, legal or contractual, owing by them to the cross-complainant. These cross-defendants are advised that the strikes or work stoppages of which complaint has been made were brought about largely, if not entirely, because of the arbitrary and unreasonable conduct of the cross-complainant and its disregard of the rights of its employees. Repeatedly during the period referred to in the cross-complaint, cross-complainant breached its contract with these defendants and disregarded its obligations to its employees by failing to pay, or being grossly delinquent in the payment of vacation pay; and in payments to the United Mine Workers of America Welfare and Retirement Fund; and in other ways.

Answer of United Mine Workers of America, etc.

XII.

These cross-defendants deny that cross-complainant is entitled to have and recover from them or either of them as punitive or exemplary damages the sum of \$100,000.00 or any other amount.

XIII.

All averments not admitted; denied or explained herein are denied.

s/ E. H. RAYSON,
s/ R. R. KRAMER,
904 Burwell Building,
Knoxville, Tennessee,
Attorneys for Cross-Defendants.

WILLARD P. OWENS,
United Mine Workers Building,
Washington, D. C.,

KRAMER, DYE, McNABB & GREENWOOD,
Burwell Building,
Knoxville, Tennessee,
Of Counsel.

I hereby certify that I have this day served copy of the foregoing answer upon Greear, Bowen, Mullins & Winston of Norton, Virginia, by mailing copy of said answer to him with postage paid thereon, and upon S. J. Milligan, Greeneville, Tennessee, by causing copy of this answer to be left at his office, the said Greear, Bowen, Mullins & Winston and S. J. Milligan appearing as counsel for said cross-complainant.

This March 1, 1955.

s/ E. H. RAYSON.

Order Pursuant to Pretrial

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee,
Northeastern Division.

JOHN L. LEWIS, CHARLES A. OWEN
and **JOSEPHINE ROCHE**, as Trustees
of the United Mine Workers of
America and Welfare and Retirement
Fund,

vs.

THE BENEDICT COAL CORPORA-
TION, a Virginia Corporation.

Civil Action
No. 944.

ORDER PURSUANT TO PRETRIAL.

It is agreed by counsel for the parties and ordered by the court that this statement will be binding at trial of the case on its merits:

Nature of Action:

This is a suit by plaintiffs as trustees of the Welfare Fund, set up under certain Bituminous Wage Agreements for certain purposes, to recover from defendant certain payments due to the Welfare Fund under said agreements which plaintiff alleges are unpaid.

Defendant filed a counter-claim against the original plaintiffs for royalties already paid. Defendant has also filed a cross-claim for damages in the sum of \$239,403.92.

Theories Upon Which Plaintiffs Expect to Recover:

1. The plaintiff says that a trust was established and that the trust instruments here involved are embodied, and is an integral part, of the National Bituminous Wage Agreements of 1950 and 1952—the Agreement of 1950

Order Pursuant to Pretrial

being supplemented but not entirely superceded by the Agreement of 1952. That the trust is executory in nature in that the trust res was not in existence at the time of the execution of the contracts under which the trust arose. Such res came into existence when there was produced or mined the coal upon the tonnage of which the royalty was to be computed.

At the time these wage agreements were executed the coal was in the ground and the res was not in existence and came into existence under this executory trust when the coal was mined.

Inasmuch as the basis of the plaintiffs' action is that they as trustees are entitled to recover from the defendant as the settlor of the res of this trust, such recovery may be had from the settler regardless of any so-called strikes or work stoppages because the tonnage of the coal was mined during times when there was no work stoppage, when there were no strikes, and during periods when there were—under any construction—no violation of the wage agreements or the Labor-Management Relations Act, and at times when there had been no repudiation of these Bituminous Wage Agreements by the settler because at the time the coal was mined and the trust became an executed instrument as to the royalty of such tonnage except for the payment of the res by the settler to the trustees, and that therefore, while not conceding, but if there were any work stoppages or any strikes that were violative of either of these agreements by the United Mine Workers of America, such work stoppage or violation of the Labor-Management Relations Act is not a defense either to plaintiffs' claim for \$80,000.00-plus, nor can it be used as a basis for defendant's counter-claim of \$90,000.00.

2. That if plaintiffs be in error on this theory and plaintiffs be construed to be what has been intimated as a third

Order Pursuant to Pretrial

party beneficiary to the contract and are therefore claimed to be bound by breaches of the contract, it is divided into two sections:

(a) There was no violation of the terms of these agreements, there being two involved, between parties to the original or to the Bituminous Wage Agreements that if there were violations in either strikes or work stoppages they were not violations by the parties or agents of the parties to these agreements but was by an intervening or outside, or third party.

(b) Assuming that such work stoppages or strikes occurred, or that some of them occurred during the period here involved, and assuming that the International or District No. 28 of the UMW can be charged therewith, either on the basis of original participation or ratification, such violations of the provisions would not bar a recovery for the reasons already indicated, and for the further reason that there had been no repudiation of the contract—if there were work stoppages then the work picked up again and went right on without repudiation of the contract.

Theories Upon Which Defendant Expects to Defeat the Allegations of the Original Complaint:

1. The plaintiff trustees are bringing this action as beneficiaries of the contract entered into between the Benedict Coal Corporation, through the Virginia Coal Operations Association, on the one part, and the United Mine Workers of America and United Mine Workers of America District No. 28, on the second part. The United Mine Workers of America and its District No. 28 breached the contract by refusing to use the contractual provisions for the adjustment of disputes by authorizing and ratifying strikes by its members as a method of settling disputes and by authorizing and ratifying a number of such illegal strikes. These acts were breaches of the

Order Pursuant to Pretrial

contract and also damaged Benedict Coal Corporation to such an extent that they were unable to make all of the royalty payments due under the same contract. These acts on the part of the United Mine Workers of America and its District No. 28 are valid defenses to any action brought by the beneficiaries to the contract, the plaintiff trustees.

Further, the striking by the individual members was a breach of the contract to which they were a party and such breach is relied on as the defense to this action brought in their behalf.

2. The contract sued on provided that its purposes would be to make payments of benefits "on account of sickness, temporary disability, permanent disability, death or retirement." In 1954 the Trustees discontinued said disability payments, not for reasons of economy, but in order to make the localities assume more responsibility. The Trustees have certain discretion with respect to coverage and eligibility, but this discretion is "subject to the stated purposes of this fund." The amount of the curtailing of these benefits from this class of beneficiaries will be developed by depositions or interrogatories. Defendant does not have these exact figures now. If it develops that this curtailment has been a substantial deviation from the purposes of this trust, then this will be relied on as a ground of defense as thwarting the purpose of the trust.

Defendant's Theory No. 2 is also the basis of defendant's counter-claim against the original plaintiffs.

Theories upon Which Original Plaintiff Expects to Defeat the Counter-Claim:

In addition to the theories advanced in respect to the original complaint which plaintiff relies upon to defeat the cross action and counter-claim, plaintiff relies also on

Order Pursuant to Pretrial

the following as additional defenses to the cross claim and counter-claim:

Insofar as defendant has disclosed as to what they are relying on in connection with the action taken by the Trustees in a resolution dated January 15, 1954, as violating the terms of the trust, original plaintiff says that there was no breach of the trust by the Trustees in the adoption of the resolution of January 15, 1954, and that the adoption of the resolution and the carrying out of the provisions thereof did not constitute a breach of the provisions of the trust. Further, that it is a matter of discretion for the trustees and did not amount to a breach of trust. (Said resolution provided for the discontinuance of certain types of benefits.)

Original plaintiff further says in relation to the counter-claim that this is a charitable trust and payments once voluntarily made to a charitable trust cannot be recovered and therefore counter-claim cannot stand.

Theories Upon Which Cross-Plaintiff Expects to Recover:

The cross-claimant expects to recover on breach of certain contracts existing between the United Mine Workers of America and its District No. 28 on the one part, and Benedict Coal Corporation on the other. Cross-claimants also claim they were damaged by virtue of three strikes which amounted to secondary boycotts and which were violations of the Labor Management Relations Act.

Cross-claimant further says that the International and District No. 28 either ratified or instigated, or were cognizant of certain strikes at cross-claimant's place of business and as a consequence cross-claimant was shut down and damaged in the amount sued for. Further, that the strikes were utilized in lieu of the contractual provisions for

Order Pursuant to Pretrial

arbitration and the settlement of disputes as provided in the contract.

Cross-claimant says further that the secondary boycotts occurred on February 8, 1952, April 24-25, 1952, and also May 18th through 29th, 1953, and said secondary boycotts were a statutory breach of contract in that they violated the Federal statute, and certain other alleged strikes referred to was a contractual breach.

Theories Upon Which Cross-Defendant Expects to Defeat Cross-Action:

1. There was no breach of these Bituminous Wage Agreements by either of the defendants to the cross-action.
2. There was no ratification or approval given by the defendant to the present action, or the cross-defendants, to any of these so-called work stoppages or strikes.
3. The defendants to this action, to meet squarely the language used by opposing counsel, were neither directly nor indirectly responsible in any legal manner for these so-called work stoppages or strikes.
4. These defendants to the cross-action deny that they were parties to or in anywise responsible for any secondary boycotts upon any of the dates averred, if such secondary boycotts did occur.

Issues:

1. What was the tonnage of coal produced for use or sale by the Benedict Coal Corporation between March 5, 1950 and September 30, 1952, and the tonnage of coal produced for use or sale by the Benedict Coal Corporation between October 1, 1952 and July 31, 1953?

2. What is the amount of royalty which was due for the coal mined during each of the two respective periods re-

Order Pursuant to Pretrial

ferred to in Issue No. 1? (It is stipulated that the royalty was at the rate of 30¢ per ton during the first period and 40¢ per ton during the second period.)

3. What amounts have been paid for each of said periods on the royalty?

4. Are the plaintiffs entitled to recover such unpaid royalty?

5. Whether or not the strikes, or any of them hereinbefore enumerated, constituted a breach or breaches of the existing contract between the parties and as a consequence whether or not such breaches, if any, can be relied upon as a defense in the original action by the Trustees?

6. Whether or not the United Mine Workers of America and/or its District No. 28, by their agents, were responsible for the aforesaid strikes and, if so, which strike?

7. Were the strikes of February 8, 1952 and April 24-25, 1952, called for the purpose of forcing N. M. Campbell, contractor, to recognize and bargain with the UMW of America and to employ certain Benedict union members who had been laid off in the mines?

8. Was the strike, if any, of May 18 through May 29, 1953, called by the cross-defendant for the purpose of forcing the Benedict Coal Corporation to cease doing business with Big Mountain Coal Corporation?

9. Was the strike, if any, of May 18 through May 29, 1953 called by the cross-defendant for the purpose of forcing the employees of Big Mountain Coal Corporation to join the UMW of America and the Benedict local against their will and desire?

10. Was District No. 28 acting as an agent for the International in any particular act which it may be shown in this record to have been committed or engaged in by District No. 28, or its officials?

Third Amendment to the Cross-Claim

Stipulations:

It is stipulated that the original plaintiffs are citizens of the states in which they aver citizenship in the original complaint.

Note: Counsel will furnish simultaneous trial briefs on what they expect the proof will show and the points of law that are controlling. Also, suggested jury instructions. Briefs to be filed on or before January 31, 1956.

The parties shall have 10 days from September 22, 1955, in which to except to any part of this order.

Approved for docketing and filing:

ROBT. L. TAYLOR,
Judge.

In the
UNITED STATES DISTRICT COURT
for the Eastern District of Tennessee.

JOHN L. LEWIS et als.,
Plaintiffs and Cross-Defendants,

v.

THE BENEDICT COAL CORPORATION,
TION,

Defendant and Cross-Plaintiff.

Civil Action
No. 2400.

THIRD AMENDMENT TO THE CROSS-CLAIM.

Comes the cross-complainant, The Benedict Coal Corporation and pursuant to leave of court files this further amendment to its cross-claim and amendments heretofore filed and amends same in the following particulars:

Third Amendment to the Cross-Claim

(a) Delete Paragraph 11 as contained in the original cross-claim and as amended and substitute the following as Paragraph 11:

That in addition to the above, The Benedict Coal Corporation had formerly engaged one M. M. Campbell, a contractor, to construct a certain slate disposal bin, a tower and cable way. The said contractor, M. M. Campbell did not employ members of the United Mine Workers of America and the United Mine Workers of America was not certified to represent his employees. That irrespective of this, the agents and members of the United Mine Workers of America and of its District 2 threatened and harassed the employees of M. M. Campbell and sought to force M. M. Campbell to employ members of The Benedict Local that had been cut off from the Benedict mines on the construction jobs of the said M. M. Campbell. The said agents and members of the United Mine Workers of America and District 28 also sought to force M. M. Campbell to sign a contract with the United Mine Workers of America although the said United Mine Workers of America had not been certified as a representative of the employees of the said M. M. Campbell. The agents and members of the United Mine Workers of America and of its District 28 thereupon called a strike at the mines of The Benedict Coal Corporation on February 8, 1952, the purpose of said strike being to force M. M. Campbell to sign a contract with the United Mine Workers of America and to employ the cut-off Benedict miners. As a result of this strike at the mines of The Benedict Coal Corporation, M. M. Campbell was forced to sign a contract with the United Mine Workers in February, 1952, and after signing this contract, Mr. Campbell slowed down his work.

In April of 1952, Mr. M. M. Campbell had a few employees and was continuing his work with The Benedict

Third Amendment to the Cross-Claim

Coal Corporation and the United Mine Workers of America and its District 28 again tried to force M. M. Campbell to employ some of the cut-off Benedict miners although these men were not carpenters and sought to force M. M. Campbell to cut the dues of certain of his employees. In order to force M. M. Campbell to comply with these demands, the United Mine Workers of America and its District 28 again held a strike at the mines of Benedict Coal Corporation on April 25 and 26. As a result of these strikes and of other harassment, M. M. Campbell was forced to quit his work and the job which he commenced for the Benedict Coal Corporation was abandoned.

As a result of these strikes aforesaid and as a result of the abandonment of the work by M. M. Campbell, The Benedict Coal Corporation was damaged in the amount of \$28,675.85 all of which damage was the result of the above stated unlawful acts on the part of the United Mine Workers of America and its District 28.

When the aforesaid disputes came up between the United Mine Workers of America and M. M. Campbell, the said United Mine Workers of America, its District 28, its agents and members failed and refused to use the methods set out in the contract then in force between The Benedict Coal Corporation and the United Mine Workers of America for the adjustment and settlement of its disputes, failed and refused to arbitrate the matters in dispute, failed and refused to prevent the said strikes by the use of proper disciplinary measures but on the other hand used the strikes in an attempt to settle the matters in dispute. These actions in addition to being a violation of the Labor Management Relations Act, were also breaches of the contract then in force between Benedict Coal Corporation and the United Mine Workers of America and the United Mine Workers of America, District 28.

Third Amendment to the Cross-Claim

(b) Paragraph 12 of the original cross-claim and its amendment is further amended so that the total amount requested as compensatory damages is \$148,078.85.

THE BENEDICT COAL CORPORATION,

By Counsel,

s/ S. J. MILLIGAN.

s/ S. J. MILLIGAN,

s/ S. J. MILLIGAN,

Attorney at Law,

Greeneville, Tennessee,

GREEAR, BOWEN, MULLINS & WINSTON,

Attorneys at Law,

Norton, Virginia,

By: **ROBERT P. WINSTON.**

I, S. J. Milligan, of counsel for the cross-claimant, Benedict Coal Corporation, do certify that the foregoing amendment to the cross-claim was served on the plaintiffs and cross-defendant by depositing true copies thereof in the United States mail, postage prepaid, addressed to B. H. Rayson, Attorney at Law, of 904 Burwell Building, Knoxville, Tennessee, as attorney for the complainant and cross-defendants, on this Jan. 31, 1956.

.....
S. J. MILLIGAN.

Address: First National Bank Bldg., Greeneville, Tennessee.

Motion for Summary Judgment

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee,
Northeastern Division.

JOHN L. LEWIS et al., Trustees,

Plaintiffs,

vs.

BENEDICT COAL CORPORATION,

Defendant.

Civil Action

No. 2400.

(Greeneville

No. 944)

MOTION FOR SUMMARY JUDGMENT.

The plaintiffs, John L. Lewis, Charles A. Owen and Josephine Roche, as trustees of the United Mine Workers of America Welfare and Retirement Fund, hereby move the Court to enter summary judgment for the plaintiffs upon the question of liability on the claim they assert against the defendant, Benedict Coal Corporation, with interest, and upon the counterclaim asserted against them by the said defendant, in accordance with the provisions of Rule 56 (a), (b) and (c) of the Rules of Civil Procedure, on the ground that the pleadings and the affidavits on file show that the plaintiffs are entitled to judgment as a matter of law.

s/ E. H. RAYSON,

s/ R. R. KRAMER,

904 Burwell Building,

Knoxville, Tennessee,

Attorneys for the Plaintiffs.

VAL J. MITCH,

HAROLD H. BACON,

Washington, D. C.,

KRAMER, DYE, McNABB & GREENWOOD,

Knoxville, Tennessee,

Of Counsel.

Amended Pretrial Order

Certificate.

I have served a copy of the foregoing upon the defendant, Benedict Coal Corporation, by placing copies thereof in the mail to Robert Winston, Attorney at Law, Norton, Virginia, and S. J. Milligan, Attorney at Law, Greeneville, Tennessee, attorneys of record for said defendant.

This 1 day of February, 1956.

s/ E. H. RAYSON.

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee,
Northeastern Division.

JOHN L. LEWIS et al.

vs.

THE BENEDICT COAL CORPORATION.

Civil Action
No. 944.
(Greeneville)

AMENDED PRETRIAL ORDER.

It is ordered that the pretrial order filed on September 22, 1955, be, and same hereby is, amended in the following particulars:

1. So as to include an additional theory upon which plaintiff expects to recover to be designated as Theory No. 3, as follows:

"3. Regardless of whether plaintiffs are considered as trustees seeking to recover trust res or as third party beneficiaries seeking as such to recover under the contracts, plaintiffs say that they are trustees of a charitable trust and therefore neither the alleged work

Amended Pretrial Order

stoppages, if such occurred, nor any alleged breach of trust constitutes a bar to recovery."

2. So as to insert immediately following the words "theories advanced," line one of the first paragraph under the "Theories upon which original plaintiff expects to defeat the counter-claim," the words, "support of." The first line of this paragraph will then read as follows: "In addition to the theories advanced in support of the original complaint which . . ."

3. So as to strike the last paragraph under, "Theories upon which cross-plaintiff expects to recover," and inserting in lieu thereof the following: "Cross-claimant says further that the secondary boycotts occurred on February 8, 1952, April 24-25, 1952, and also May 18th through 29th, 1953, and said secondary boycotts, in addition to being a violation of the Labor Management Relations Act, were also breaches of the respective contracts then existing between Benedict Coal Corporation and United Mine Workers of America and United Mine Workers of America District No. 28."

4. So as to strike all of the language in Issue No. 6, and insert in lieu thereof the following to be designated as Issue No. 6: "Whether or not the United Mine Workers of America and/or its District No. 28, by their agents, were responsible for or ratified the aforesaid strikes and, if so, which strikes."

5. By adding the following theory to the theories of cross-defendants to be designated as Theory No. 5: "The cross-plaintiffs are not entitled in any event to recover punitive damages in this action."

6. By adding an additional issue to be designated as Issue No. 11: "If it be shown that any field representative of District No. 28 approved or ratified any of the alleged

Opinion of the Court

work stoppages, was such field representative acting within the scope of his authority as such representative?"

7. By adding an additional issue to be designated as Issue No. 12: "Were M. M. Campbell and Big Mountain Coal Corporation, or either of them, an 'employer' within the meaning of subsection 2 and subsection 3 of section 303 of the Labor Management Relations Act of 1947 at the time of the alleged strikes or work stoppages of February 8, 1952, April 24-25, 1952, and May 18-29, 1953?"

Approved for docketing and filing:

ROBT. L. TAYLOR,
Judge.

In the
UNITED STATES DISTRICT COURT,
For the Eastern District of Tennessee,
Northeastern Division, at Greeneville, Tennessee.

JOHN L. LEWIS, CHARLES A. OWEN,
and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare & Retirement Fund,
Plaintiffs,

vs.

THE BENEDICT COAL CORPORATION, a Virginia Corporation,
Defendant.

Civil Action
No. 944.

OPINION OF THE COURT.

February 17, 1956.

This matter is before the Court on plaintiffs' motion for summary judgment.

Opinion of the Court

Plaintiffs Lewis, Owen and Roche, are trustees of the United Mine Workers of America Welfare & Retirement Fund, and the defendant, the Benedict Coal Corporation, is one of the coal operators that entered into an agreement with United Mine Workers of America wherein and whereby this fund was to be established.

The Court file at this time shows that the coal company paid into the fund a substantial amount of money which it seeks to have returned in this litigation on the theory that the beneficiaries of the fund breached the contract with the coal company in that the miners walked off of the work while working for the coal company without submitting their alleged grievances to arbitration or peaceful settlement as provided for in the contract. This is one of the issues that will have to be decided in this litigation and which cannot be decided on a motion for summary judgment in view of the pleadings as a whole.

Counsel on each side here today state that that is a sharply controverted issue of fact as well as law insofar as it applies to these three trustees. If the parties could agree upon the facts the Court could, in due time, reach a decision on the question of law.

One legal question involved in this motion for summary judgment is whether the coal operator, and that means the Benedict Coal Corporation, is entitled to have the trustees pay back to it all the monies paid into this fund on the two alleged grounds that, first, the trustees breached this contract in that they changed the policy as set forth in the contract by eliminating benefits to certain individuals who were entitled to these benefits under the specific terms of the contract and under the National Labor Relations Law which was the enabling act for the contract.

From an examination of the National Labor Relations Law, the contract involved in this litigation and the supplements thereto, the affidavits filed by the three trustees and entire record, the Court is of the opinion that the trustees were given comprehensive discretionary powers under the National Labor Relations Act and under the contract itself in carrying out the provisions of the law and the terms of the contract by deciding the classes of people entitled to the benefits and amounts that the trustees could pay periodically.

The affidavits which are not challenged by counter-affidavits, convince the Court that the trustees have not breached the contract in the respect indicated.

The Court is of the opinion that the trustees have handled the funds in accordance with the applicable law and the provisions of the contract.

It therefore follows, as a matter of law, that the coal company is not entitled to recover any funds paid into this fund or to defend this complaint upon the theory that the three trustees breached the contract between the coal operator and the coal miners in handling the trust funds.

Another legal question raised by the motion for summary judgment is that the coal company is entitled to recover back from the three trustees all the monies it has paid into this fund for at least two reasons: (1) Because the beneficiaries of this fund breached the contract with the coal company in that they engaged in strikes contrary to the terms of this contract; and for the additional reason which has just been disposed of.

The Court is of the opinion and holds that this money was paid over to the trustees and became an executed trust, and that as a matter of law the coal company is not

entitled to recover the amounts which it paid in and which are either now held by the trustees or which have been paid out to beneficiaries by the trustees in accordance with the applicable law and the contract involved in this suit.

This motion also raises another question, and that is that the trustees are entitled as a matter of law to a judgment for the royalties which have not been paid on the coal which was mined during the period of time involved in this litigation. The royalty was thirty cents per ton during a part of the period and forty cents per ton during the other part of the period.

In reply to this insistence, the coal company says, among other things, that the trustees are not entitled to recover the unpaid amounts of the royalties for certain reasons, the chief one of which is that the third-party beneficiaries of this fund breached the contract with the coal company thereby making the performance of the contract by the company impossible.

If the coal company can establish this defense by proof, in the opinion of this Court it is a legal defense to the claim of these trustees.

The Court concludes, therefore, that the motion for summary judgment is sustained to the extent indicated, and denied to the extent indicated.

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee,
Northeastern Division.

JOHN L. LEWIS et al.,

vs.

BENEDICT COAL CORPORATION.

Civil Action
No. 944.

**AMENDMENT TO ANSWER OF
CROSS-DEFENDANTS.**

Because of the amendment made to the cross-complaint, come the cross-defendants, United Mine Workers of America and United Mine Workers of America, District 28, and pursuant to leave of Court file this amendment to their answer, thereby deleting Paragraph IX of their answer as heretofore filed and substituting the following language in lieu thereof:

“For answer to paragraph 11 of the cross-complaint, these cross-defendants admit that the cross-complainant engaged one M. M. Campbell to do certain construction work, but neither admit nor deny that the said Campbell was a contractor or an independent contractor. They admit that the United Mine Workers of America was not certified to represent employees of the said Campbell. It is denied that agents or members of the cross-defendants threatened or harassed employees of M. M. Campbell and sought to force M. M. Campbell to employ members of the Benedict Local who had been laid off from the Benedict mines. It is further denied that the cross-defendants sought to force M. M. Campbell to sign a contract with the United Mine Workers of America, but would show

Amendment to Answer of Cross-Defendants

that the said M. M. Campbell signed a contract with the United Mine Workers of America. They deny that any agents or members of the cross-defendants called a strike at any time to force the said Campbell to sign such a contract or to employ laid-off Benedict miners. They neither admit nor deny that the said Campbell slowed down his work at any time, but if said Campbell did slow down his work at any time such slowdown was not the result of any acts or conduct on the part of these cross-defendants. They deny that they caused, authorized or participated in any action which forced the said Campbell to quit and/or abandon any work for Benedict Coal Corporation. They deny that Benedict Coal Corporation was damaged in any amount by any actions or conduct on the part of these cross-defendants. These cross-defendants deny that they were guilty of any violation of the Labor Management Relations Act or of their contract with Benedict Coal Corporation with respect to any matter in which the said M. M. Campbell was involved."

s/ E. H. RAYSON,

s/ R. R. KRAMER,

904 Burwell Building,

Knoxville, Tennessee,

Attorneys for Cross-Defendants.

WILLARD P. OWENS,

KRAMER, DYE, McNABB & GREENWOOD,

Of Counsel.

Copies of the foregoing amendment have been mailed to S. J. Milligan and Robert T. Winston, attorneys of record for Benedict Coal Corporation, this 21 day of February, 1956.

s/ E. H. RAYSON.

Verdict Form

In the
UNITED STATES DISTRICT COURT
(For the Eastern District of Tennessee,
Northeastern Division.

JOHN L. LEWIS et al., Trustees,
Plaintiffs,

vs.

THE BENEDICT COAL CORPORATION,

Defendant and
Cross-Plaintiff,

vs.

UNITED MINE WORKERS OF
AMERICA, and UNITED MINE
WORKERS OF AMERICA, DIS-
TRICT 28,

Cross-Defendants.

Civil Action
No. 994.
(Greenville)

VERDICT FORM.

1. In the named suit of the Trustees against Benedict Coal Corporation we find that plaintiff Trustees are entitled to recover as unpaid royalties the sum of **\$76,504.21.**

2. As against this sum we find that the defendant Benedict Coal Corporation is entitled to a set-off of **\$81,017.68.**

3. In the cross-action of Benedict Coal Corporation against the defendant Unions our verdict is for **Cross-Plaintiff Benedict Coal Corporation** (Cross-Plaintiff Benedict Coal Corporation, or Cross-Defendants United Mine Workers and United Mine Workers, District 28).

4. (If for the Cross-Plaintiff) Our verdict for the Cross-Plaintiff is for the sum of **\$81,017.68.**

Judgment

Note: If any part of the damage claimed by Benedict was caused solely by acts or actions of individual members of the Local Union, or the Local Union, such part or parts should not be charged to United Mine Workers or United Mine Workers District 28 in any award under the cross-action. However, as to the principal claim, such acts or actions of the individual members of the Local Union would be a defense.

s. BURLEIGH L. DAY,

Foreman.

In the

UNITED STATES DISTRICT COURT

For the Eastern District of Tennessee,

Northeastern Division.

JOHN L. LEWIS et al., Trustees,

vs.

THE BENEDICT COAL CORPORATION.

Civil Action

No. 944.

JUDGMENT.

This case was heretofore heard by the Court on plaintiffs' motion for summary judgment on the counterclaim filed against the plaintiffs, and in accordance with the opinion of the Court heretofore filed herein, it is ordered, adjudged and decreed that the motion of the plaintiff Trustees for summary judgment as to the counterclaim filed against it by the defendant, Benedict Coal Corporation, be and is hereby sustained, and said counterclaim is accordingly dismissed.

It is further ordered, adjudged and decreed that the motion of plaintiff Trustees for summary judgment upon the question of liability as a matter of law on the claim the plaintiff Trustees asserted against the defendant, Benedict

Judgment

Coal Corporation, for unpaid royalties, be and the same is hereby denied.

Thereupon this action came on to be heard on a former day before the Court and a verdict was rendered by the jury in favor of Benedict Coal Corporation in the sum of \$81,017.68 and in favor of John L. Lewis, Charles A. Owen and Josephine Roche in the sum of \$76,504.26; the verdict containing an offset provision.

In accordance with the Court's interpretation of the offset provision in the jury's verdict and as a means of carrying out the intended effect of the verdict, it is ordered that the Benedict Coal Corporation have and recover the sum of \$81,017.68 from United Mine Workers of America and United Mine Workers of America District 28, for which execution may issue.

It is further ordered that said sum of \$81,017.68 be paid into the registry of the Court to be disbursed by the clerk in accordance with instructions appearing below.

It is further ordered that said Trustees, in accordance with the verdict rendered in their favor, have and recover of Benedict Coal Corporation the sum of \$76,504.26, said recovery to be had in the manner following: From the aforesaid \$81,017.68 ordered paid into the registry of the Court, that the sum of \$76,504.26 be paid to said Trustees. That the difference between \$76,504.26 and \$81,017.68 be paid to Benedict Coal Corporation.

It is further ordered that one-half of the court costs be paid by Benedict Coal Corporation and one-half by United Mine Workers of America and United Mine Workers of America District 28, for which execution may issue, unless said costs are paid.

Enter:

ROBT. L. TAYLOR,

Judge.

Motion for a New Trial

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee,
Northeastern Division.

JOHN L. LEWIS et al., Trustees,
Plaintiffs,

vs.

BENEDICT COAL CORPORATION,
Defendant and Cross-Plaintiff,

vs.

**UNITED MINE WORKERS OF
AMERICA and UNITED MINE
WORKERS OF AMERICA, DIS-
TRICT 28,**

Cross-Defendants.

No. 944.

MOTION FOR A NEW TRIAL.

Come the cross-defendants, United Mine Workers of America and United Mine Workers of America, District 28, and move that the verdict of the jury in the above-entitled cause be set aside, and that the judgment entered on the verdict be vacated and set aside and that a new trial be granted to the cross-defendants, for the following reasons:

1. There is no material evidence to support the verdict.
2. The verdict is contrary to the weight of the evidence.
3. The Court erred in permitting the witness Scott to interpret or construe the meaning which he and others

Motion for a New Trial

attributed to the statement "You know what to do" which statement this witness testified was made to him by Mr. Scroggs.

4. The learned Court erred in charging the jury as follows:

"I therefore charge you that if you find that the local coal miners employed by Benedict used these strikes as a means of settling their disputes and forcing their demands on Benedict, and if you further find that these actions were encouraged, suggested or ratified by the field representatives of District 28, or other officers or agents of District 28, then the defendants, United Mine Workers of America and District 28, would be liable for the damages resulting from such strikes."

5. The learned Court erred in charging the jury as follows:

"I further charge you that if you find that the representatives of United Mine Workers of America failed or refused to use their good offices, as provided in this contract for the adjudication of these disputes, or any of them, or if you find that defendant unions failed to exercise their best efforts through disciplinary methods during the period covered by the 1950 contract, namely, from March 5, 1950 to June 5, 1952—keep in mind at this point that the union did not contract to use disciplinary methods to prevent strikes after June 20, 1952—to prevent stoppage of work by strikes, or to use their best efforts to settle the strike issues by administrative procedure as those unions had agreed to do, then the unions breached the contract in those respects. If you find that Benedict was damaged by breach of contract, there should be a ver-

Motion for a New Trial

dict for Benedict for the amount of damages thus sustained."

6. The learned Court erred in charging the jury as follows:

"With respect to the responsibility of the Union for the acts of its representatives and officers, you are instructed that a labor union can act only through its officers and agents and it is responsible for acts by its officers and agents done within the scope of their authority or employment. An agent is one who by the authority of his principal transacts his principal's business or some part of it, and represents his principal in dealing with third persons.

"In determining whether Mr. E. L. Scroggs, Mr. Allen Condra or Mr. M. W. Clark, or any other agent of District 28 was acting as an agent of the United Mine Workers of America or of District 28, United Mine Workers of America, so as to make the international union and District 28 responsible for their acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

7. The learned Court erred in submitting to the jury the question of whether these cross-defendants violated Section 303 of the Labor Management Relations Act with regard to any one of the following strikes:

February 8, 1952

February 25 and 26, 1952

May 18, 1953

8. The learned Court erred in that portion of the charge wherein there was submitted to the jury the question of whether these cross-defendants violated any provision of

Motion for a New Trial.

the Wage Agreement of 1950 or of said Agreement as amended with respect to any one of the following strikes:

April 14-17, 1950

September 27, 28 and 29, 1950

January 10 and 11, 1951

July 30 and 31, 1951

October 1-8, 1951

November 2, 7, 1951

February 7, 8, 1952

April 24, 25, 1952

August 5, 6, 1952

October 16-28, 1952

May 18-27, 1953

9. The learned Court erred in the charge in that it failed to explain therein that a "no strike clause" was expressly removed by the Agreement of 1950 and said Agreement as amended in 1952 and in that it failed to explain the effect of the removal of such clause.

10. The learned Court erred in the charge in that it failed therein to state to the jury that under the Agreement as amended in 1952, these cross-defendants were under no obligation to induce members of local unions to refrain from striking or to return to work.

11. The Court erred in failing to direct the jury to find what amount, if any, of the damages they found that Benedict had suffered by breach of contract was attributable to acts of the local union or of individual members of the local union, upon the request by these cross-defendants.

12. The learned Court erred in permitting and requiring this case to be tried upon the theory that alleged damages which these cross-defendants caused to the Benedict Coal Corporation could be offset against any amount owing by

Motion for a New Trial

the Benedict Coal Corporation to the Trustees of the United Mine Workers of America Welfare and Retirement Fund and that alleged damages caused by individuals and the Benedict Local Union as well could be offset against the amount owing by Benedict Coal Corporation to the Trustees.

13. The verdict of the jury is contradictory.

14. The verdict of the jury is so contradictory as to amount to a nullity.

15. The verdict is grossly excessive.

Respectfully submitted,

s/ JAMES N. HARDIN,

Greeneville, Tennessee,

s/ E. H. RAYSON,

s/ R. R. KRAMER,

904 Barwell Building,

Knoxville, Tennessee,

Attorneys for Cross-Defendants.

WILLARD P. OWENS,

KRAMER, DYE, McNABB & GREENWOOD,

Of Counsel.

We have served the foregoing Motion upon the defendant by leaving a copy thereof at the office of Mr. S. J. Milligan and by mailing a copy thereof to Mr. Robert T. Winston the attorneys of record for Benedict Coal Corporation, this April 26, 1956.

s/ R. R. KRAMER.

Motion to Amend Judgment

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee,
Northeastern Division.

JOHN L. LEWIS et al., Trustees,
Plaintiffs,

vs.

BENEDICT COAL CORPORATION,
Defendant.

Civil Action
No. 944.

MOTION TO AMEND JUDGMENT.

Come now John L. Lewis, Charles A. Owen and Josephine Roche, Trustees of the United Mine Workers of America Welfare and Retirement Fund, being the plaintiffs in the above-entitled cause, and show to the Court that the judgment as made and entered in this cause on the 16th day of April, 1956, in favor of the plaintiff Trustees in the sum of \$76,504.26 fails to provide for the issuance of an execution for the collection of said judgment although, under the facts as developed in this case and the law applicable thereto, plaintiffs are entitled to an unconditional judgment for said amount against the defendant Benedict Coal Corporation and without limitation to the satisfaction of said judgment from the recovery awarded against the United Mine Workers of America and United Mine Workers of America, District 28.

Wherefore, said plaintiffs move the Court that said judgment be amended so as to provide therein for the issuance of execution for the collection of said judgment and the elimination from said judgment of the provision that the

Motion to Amend Judgment

recovery awarded the Trustees be satisfied out of the judgment awarded to the Benedict Coal Corporation.

The plaintiff Trustees further show to the Court that in the judgment made and entered in this cause on the 16th day of April, 1956, an award was made in favor of the plaintiff Trustees in the sum of \$76,504.26 but in said judgment, as awarded, no interest is included in said sum nor awarded to the plaintiff Trustees.

The amount for which said judgment was awarded was a sum certain agreed to by stipulation as being owing at and before the time this suit was instituted and under the circumstances disclosed in this record, said plaintiffs were entitled to interest on the amount of this award.

Wherefore, said plaintiffs further move the Court:

1. That said judgment be amended and that there be added to the amount of the judgment as awarded interest at the rate of six percent (6%) per annum from the date on which the last payment of royalty was due, to-wit, August 10, 1953, to the date of judgment, to-wit, April 16, 1956, which interest amounts to \$12,317.18, thus making the total judgment \$88,821.44.

2. That in the event the Court be of the opinion that interest on said award does not properly accrue on the amount thereof from August 10, 1953, that said judgment be amended and that there be added to the amount of the judgment interest at the rate of six percent (6%) per annum from the date of institution of this action, to-wit, May 27, 1954, to the date of judgment, to-wit, April 16, 1956, which interest amounts to \$8,657.73, thus making the total judgment \$85,161.99.

Plaintiffs further move the Court that such other changes and corrections be made in said judgment as may

be necessary because of the amendments and corrections thereof which are herein prayed for.

Dated this April 26, 1956.

s/ JAMES N. HARDIN,
Greeneville, Tennessee,

s/ E. H. RAYSON,

s/ R. R. KRAMER,

904 Burwell Building,

Knoxville, Tennessee,

Attorneys for Plaintiff
Trustees.

VAL J. MITCH,
HAROLD H. BACON,
KRAMER, DYE, McNABB & GREENWOOD,
Of Counsel.

Certificate.

Copy of the foregoing motion has been served on the defendant Benedict Coal Corporation by leaving a copy thereof at the office of Mr. S. J. Milligan and by placing a copy thereof in the United States mail, postage prepaid, to Mr. Robert T. Winston, attorneys of record for Benedict Coal Corporation.

s/ R. R. KRAMER.

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee,
Northeastern Division.

JOHN L. LEWIS et al., Trustees,
Plaintiffs,

vs.

BENEDICT COAL CORPORATION,
Defendant and Cross-Plaintiff,

vs.

UNITED MINE WORKERS OF
AMERICA and UNITED MINE
WORKERS OF AMERICA, DIS-
TRICT 28,

Cross-Defendants.

Civil Action
No. 944.

ORDER.

For the reason that the sum certain owing to plaintiff trustees was rendered uncertain by possibility of set-off because of violation by the cross-defendants of the contract of which the plaintiffs were third-party beneficiaries, plaintiffs' grounds for allowance of interest are not well taken.

For the further reason that plaintiff trustees, as such beneficiaries, were entitled to benefits from the contract's performance and not from its breach, they have a right to unconditional judgment against Benedict for only such sum as their judgment for royalties exceeds the damages adjudged against the cross-defendants. As no such excess exists, no basis exists for an unconditional judgment against Benedict Coal Corporation in favor of plaintiffs.

Order

It is, accordingly, ordered that cross-defendants' motion for allowance of interest and for an unconditional judgment be, and it hereby is, overruled in both particulars.

Enter:

ROBT. L. TAYLOR,

Judge.

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee
Northeastern Division.

JOHN L. LEWIS et al., Trustees,
Plaintiffs,

vs.

BENEDICT COAL CORPORATION,
Defendant and Cross-Plaintiff,

vs.

UNITED MINE WORKERS OF
AMERICA and UNITED MINE
WORKERS OF AMERICA, DIS-
TRICT 28,

Cross-Defendants.

Civil Action
No. 944.

ORDER.

Having by the Court been considered, along with briefs in support and opposition thereto, the motion of the cross-defendants for a new trial is deemed to be without merit.

Accordingly, it is ordered by the Court that said motion be, and it hereby is, denied.

Enter:

ROBT. L. TAYLOR,

Judge.

Order

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee,
Northeastern Division.

JOHN L. LEWIS et al., Trustees,
Plaintiffs,

vs.

BENEDICT COAL CORPORATION,
Defendant and Cross-Plaintiff,

vs.

UNITED MINE WORKERS OF
AMERICA and UNITED MINE
WORKERS OF AMERICA, DIS-
TRICT 28,
Cross-Defendants.

Civil Action
No. 944.

ORDER.

Upon application of the plaintiffs to amend the order of the Court entered on August 16, 1956, overruling the motion of the plaintiffs for the allowance of interest and for unconditional judgment it is ordered that said order is modified by striking therefrom the words "cross-defendants'" as said words appear in the first line of the last paragraph of said order and by inserting in said order in lieu thereof the word "plaintiffs'".

Enter:

s/ ROBT. L. TAYLOR,
Judge.

EXHIBIT NO. 2.

**NATIONAL BITUMINOUS COAL WAGE
AGREEMENT OF 1950.**

Effective March 5, 1950, to June 30, 1952.

Executed at Washington, D. C. March 5, 1950.

This Agreement, made this 5th day of March, 1950, by and between the coal operators and associations signatory hereto hereinafter referred to as Operators, parties of the first part, and the International Union, United Mine Workers of America, hereinafter referred to as Mine Workers, on behalf of each member thereof, party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements previous agreements as herein provided. This agreement (subject to the amendments; modifications and supplements as hereinafter provided) carries forward and preserves the terms and conditions of the Appalachian Joint Wage Agreement (dated June 19, 1941) effective April 1, 1941, to March 31, 1943, the Supplemental Six Day Work Week Agreement, the National Bituminous Coal Wage Agreement (dated April 11, 1945) effective April 1, 1945, and all the various District Agreements executed between the United Mine Workers of America and the various Operators and Coal Associations (based upon the aforesaid basic agreements) as they existed on March 31, 1946, subject to the terms and conditions of this Agreement and as amended, modified and supplemented by this Agreement as herein set out.

Witnesseth: It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties, as defined and set forth in this Agreement. It is agreed that the United Mine Workers of America is recognized

herein as the exclusive bargaining agency representing the employees of the parties of the first part. It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, to the extent and in the manner permitted by law, except in those exempted classifications of employment as hereinafter provided in this agreement. This provision does not change the rules or practices of the industry pertaining to management. The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood. It is the intent and purpose of the parties hereto that this agreement will promote and improve industrial and economic relationship in the bituminous coal industry and to set forth herein the basic agreements covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed in the bituminous coal mines covered by this Agreement.

Exemptions Under This Agreement.

It is the intention of this Agreement to reserve to management and except from this Agreement an adequate force of supervisory employees to effectively conduct the safe and efficient operation of the mines and at the same time, to provide against the abuse of such exemptions by excepting more such employees than are reasonably required for that purpose.

Coal Inspectors and Weigh Bosses at mines where men are paid by the ton, Watchmen, Clerks, Engineering and Technical forces of the operator, working at or from a District or local mine office, are exempt from this agreement.

All other employees working in or about the mines shall be included in this Agreement except essential supervisors

in fact such as: Mine Foremen, Assistant Mine Foremen who, in the usual performance of their duties, may make examinations for gas as prescribed by law, and such other supervisors as are in charge of any class of labor inside or outside of the mines and who perform no production work.

The Union will not seek to organize or ask recognition for such excepted supervisor employees during the life of this contract.

The Operators shall not use this provision to exempt from the provisions of this Agreement as supervisors, more men than are necessary for the safe and efficient operation of the mine, taking into consideration the area covered by the workings, roof conditions, drainage conditions, explosion hazards, and the ability of supervisors, due to thickness of the seam, to make the essential number of visits to the working faces as required by law and safety regulations.

Disputes arising under this section shall be referred to a Joint Board of Review consisting of two representatives of the Union and two representatives of the Operators whose decision shall be final and binding on the parties.

Mine Safety Program.

(a) Mine Safety Code.

The Federal Mine Safety Code for bituminous coal and lignite mines of the United States, adopted pursuant to an agreement dated May 29, 1946, between the Secretary of the Interior and the President of the United Mine Workers of America and promulgated July 24, 1946, is hereby adopted and incorporated by reference in this contract as a code for health and safety in bituminous and lignite mines of the parties of the first part, with the following exceptions and alterations:

Exhibit No. 2

(1) The opening paragraph beginning with the words "pursuant to" and ending with the words "Executive Order" is stricken out.

(2) The words "Coal Mines Administrator" are stricken out wherever they appear.

(3) Sections 5(a) and 5(b) of Article XII and all of Article XIV are stricken out.

(4) References in the Code to its effective date shall be deemed to refer to the effective date of this contract.

(b) **Enforcement.**

(1) Reports of the Federal Coal Mines Inspectors: Wherever Inspectors of the Federal Bureau of Mines, in making their inspections in accordance with authority as provided in Public Law 49, 79th Congress, find that there are violations of this Code and make recommendations for the elimination of such non-compliance, the Operators shall promptly comply with such recommendations, except as modified in paragraph two of this subdivision (b).

(2) Whenever either party to the contract feels that compliance with the recommendations of the Federal Mine Inspectors as provided above would cause irreparable damage or great injustice, they may appeal such recommendation to the Joint Board of Review as hereinafter provided.

(c) **Review and Revision.**

In order to carry out the intent and purposes of the agreement affecting the Mine Safety Code, it is agreed that from time to time joint consultations shall be had with the U. S. Bureau of Mines looking toward review and appropriate revision of the Mine Safety Code.

Exhibit No. 2

(d) Joint Industry Safety Committee.

There is hereby established under this Agreement a joint Industry Safety Committee composed of four members, two of whom will be appointed by the Mine Workers and two of whom will be appointed by the Operators, whose duty it shall be to (1) arbitrate any appeal which is filed with it by any Operator or any Mine Worker who feels that any reported violations of the Code and recommendation of compliance by a Federal Coal Mine Inspector has not been justly reported or that the action required of him to correct the violation would subject him to irreparable damage or great injustice; and (2) to consult with the U. S. Bureau of Mines in accordance with the provisions of Section (c) above.

(e) Mine Safety Committee.

At each mine there shall be a Mine Safety Committee selected by the Local Union. The Committee Members while engaged in the performance of their duties shall be paid by the Union, but shall be deemed to be acting within the scope of their employment in the mine within the meaning of the Workmen's Compensation Law of the state where such duties are performed.

The Mine Safety Committee may inspect any mine development or equipment used in producing coal. If the Committee believes conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special instances where the committee believes an immediate danger exists and the Committee recommends that the management remove all mine workers from the unsafe area, the Operator is required to follow the recommendation of the Committee.

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If the Safety Committee in closing down an unsafe area acts arbitrarily and capriciously, members of such Committee may be removed from the Committee. Grievances that may arise as a result of a request for removal of a member of the Safety Committee under this section shall be handled in accordance with the provisions providing for settlement of disputes.

The Safety Committee and Operators shall maintain such records concerning inspections, findings, recommendations, and actions relating to this provision of the Agreement as may be required, and copies of all reports made by the Safety Committee shall be filed with the Operators.

(f) The International Union, United Mine Workers of America may designate memorial periods not exceeding a total of 5 days in the period ending April 1st, 1951, and not to exceed a total of 5 days in the period from April 1, 1951, to June 30th, 1952, provided it shall give proper notice to each district.

Workmen's Compensation and Occupational Diseases.

Each Operator who is a party to this Agreement will provide the protection and coverage of the benefits under Workmen's Compensation and Occupational Disease Laws, whether compulsory or elective, existing in the states in which the respective employees are employed. Refusal of any Operator to carry out this direction shall be deemed a violation of this Agreement. Notice of Compliance with this section shall be posted at the mine.

United Mine Workers of America Welfare and Retirement Fund of 1950.

A. It is hereby stipulated and agreed by the contracting parties hereto that there is hereby created a Fund to be

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designated and known as the "United Mine Workers of America Welfare and Retirement Fund of 1950." During the life of this Agreement, there shall be paid into such Fund by each operator signatory hereto the sum of thirty cents (30c) per ton of two thousand (2,000) pounds on each ton of coal produced for use or for sale. Such Fund shall have its place of business in Washington, District of Columbia, and it shall be operated by a Board of Trustees, one of whom shall be appointed as a representative of the Employers, one of whom shall be appointed as a representative of the United Mine Workers of America and one of whom shall be a neutral party, selected by the other two. In the event of resignation, death, inability or unwillingness to serve of the Trustee appointed by the Operators or the Trustee appointed by the United Mine Workers of America, the Operators shall appoint the successor of the Trustee originally appointed by them and the United Mine Workers of America shall appoint the successor of the Trustee originally appointed by it.

The Operators signatory hereto do hereby appoint Charles A. Owen, of New York City, as their representative on said Board of Trustees. The United Mine Workers of America do hereby appoint John L. Lewis, of Washington, D. C., as its representative on said Board of Trustees. It is further stipulated and agreed by the joint contracting parties that Josephine Roche, of Denver, Colorado is appointed as the neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Fund herein created.

In the event of a deadlock on the designation or agreement as to any future neutral Trustee, an impartial umpire shall be selected either by agreement of the two Trustees, representatives of the contracting parties hereto, or by petition by either of the contracting parties hereto to the

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- United States District Court for the District of Columbia for the appointment of such an impartial umpire, all as made and provided in Section 302 (c) of the "Labor-Management Relations Act, 1947."

It is agreed by the contracting parties hereto that the Trustees herein provided for shall serve for the duration of this contract and as long thereafter as the proper continuation and administration of said trust shall require.

It is agreed that this Fund is an irrevocable trust created pursuant to Section 302 (c) of the "Labor-Management Relations Act, 1947," and shall endure as long as the purposes for its creation shall exist. Said purposes shall be to make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise compensated for at all or adequately by tax-supported agencies created by federal or State law; (3) benefits on account of sickness, temporary disability, permanent disability, death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302 (c) of the "Labor-Management Relations Act, 1947," as agreed upon from time to time by the Trustees including the making of any or all of the foregoing benefits applicable to the individual members of the United Mine Workers of America and their families and dependents, and to employees of the Operators other than those exempted from this Agreement; and (5) benefits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the afore-

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said "Labor-Management Relations Act, 1947." Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the "Labor-Management Relations Act, 1947," and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

The aforesaid Trustees shall designate a portion (which may be changed from time to time) of the payments herein provided, based upon proper actuarial computations, as a separate fund to be administered by the said Trustees herein described and to be used for providing for pensions or annuities for the members of the United Mine Workers of America or their families or dependents and such other persons as may be properly included as beneficiaries thereunder.

It is further agreed that the detailed basis upon which payments from the Fund will be made shall be resolved in writing by the aforesaid Trustees at their initial meeting, or at the earliest practicable date that may by them thereafter be agreed upon.

Title to all the moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust and that no benefits or moneys payable from this Fund shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void. The moneys to be paid into said Fund shall not constitute or be deemed wages due to the individual mine

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worker, nor shall said moneys in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money, i. e., the beneficiaries of said Trust under the terms of this Agreement.

The obligation to make payments to the "United Mine Workers of America Welfare and Retirement Fund of 1950" under this contract shall become effective on March 6, 1950, and the first actual payments are to be made on April 10, 1950, and thereafter continuously on the 10th day of each succeeding calendar month covering the production of all coal for use or sale during the preceding month.

It is stipulated and agreed by the contracting parties hereto that the Trustee designated by the United Mine Workers of America shall be the Chairman of the Trustees of the Fund provided for in this Agreement.

It shall be the duty of the Operators signatory hereto, and each of them, to keep said payments due said Fund, as hereinabove described and provided for, current and to furnish to the United Mine Workers of America and to the Trustees hereinabove designated a monthly statement showing the full amount due hereunder for all coal produced for use or for sale from each of the several individual mines owned or operated by the said Operators signatory hereto. Payments to said Fund shall be made by check payable to "United Mine Workers of America Welfare and Retirement Fund of 1950" and shall be delivered or mailed to the office of said Fund located at 907 Fifteenth Street, N. W., Washington, D. C., or as otherwise designated by the Trustees.

It is stipulated and agreed by the contracting parties hereto that an annual audit of the Fund hereinabove described shall be made by competent authorities to be des-

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ignated by the Trustees of said Fund. A statement of the results of such audit shall be made available for inspection of interested persons at the principal office of the Trust Fund and at such other places as may be designated by the Trustees.

Failure of any Operator signatory hereto to make full and prompt payments to the "United Mine Workers of America Welfare and Retirement Fund of 1950" in the manner and on the dates herein provided shall, at the option of the United Mine Workers of America, be deemed a violation of this Agreement. This obligation of each Operator signatory hereto, which is several and not joint, to so pay such sums shall be a direct and continuing obligation of said Operator during the life of this Agreement and it shall be deemed a violation of this Agreement if any mine to which this Agreement is applicable shall be sold, leased, sub-leased, assigned, or otherwise disposed of for the purpose of avoiding the obligation hereunder.

Action which may be required hereunder by the Operators for the appointment of a successor Trustee representing them, or which may be required in connection with any other matter hereunder, may be taken by those Operators who at the time are parties hereto, and authorization, approval, or ratification of Operators representing fifty-one percent (51%) or more of the coal produced for use or sale during the calendar year previous to that in which the action is taken shall be sufficient and shall bind all Operators.

B. It is hereby stipulated and agreed by the contracting parties with respect to the Fund created by the National Bituminous Coal Wage Agreement of 1947:

(1) The Operators signatory hereto agree to make payments into said Fund on or before March 15,

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1950, on account of all coal produced for use or sale up to and including March 6, 1950, with respect to which payment has not heretofore been made, such payments to be on the basis heretofore made by said Operators under the National Bituminous Coal Wage Agreement of 1947 and the National Bituminous Coal Wage Agreement of 1948, whichever is applicable.

(2) The Operators signatory hereto hereby renounce and forever release any and all claim to or interest in payments made into the said 1947 fund.

(3) The Trustees appointed pursuant to this Agreement are hereby authorized and directed to accept into the new trust fund hereby created and to devote for the purposes hereinabove specified and enumerated, any and all trust funds remaining unexpended or unobligated in said 1947 trust fund.

(4) The parties hereto agree that the best interest of the beneficiaries of said trust fund would be served by having all unexpended or unobligated funds therein transferred as above provided, and agree that the Trustees thereof should transfer such funds to the new trust fund created by this Agreement.

C. It is stipulated, understood and agreed by the contracting parties hereto that the present practices with respect to wage deductions and their use for provision of medical, hospital and related services shall continue during the terms of this contract or until such earlier date or dates as may be agreed upon by the United Mine Workers of America and any Operator signatory hereto.

D. It is the intent and purpose of the contracting parties hereto that full cooperation shall by each of them be given to each other, the Trustees named under this Section and to all affected Mine Workers to the eventual coordination

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and development of policies and working agreements necessary or advisable for the effective operation of this Fund.

Wages and Hours.

1. (a) For all inside employees a work day of eight hours from portal to portal is established, including a staggered thirty minutes for lunch, and without any intermission or suspension of operation throughout the day. For inside day workers these eight hours shall be paid for at straight time rate. Overtime beyond eight hours per day and forty hours per week shall be paid for at time and one-half with no pyramiding of overtime. Straight time rates for inside day workers shall be the total daily normal shift earnings for eight hours divided by eight (8) hours.

(b) For all outside employees except those covered in paragraph (c) hereof (including all strip mine and coke oven employees), a work day of seven hours and fifteen minutes is established including a staggered thirty minutes for lunch, and without any intermission or suspension of operations throughout the day. These seven hours and fifteen minutes shall be paid for at straight time rate. Overtime beyond seven hours and fifteen minutes per day and thirty-six and one-quarter hours per week shall be paid for at time and one-half with no pyramiding of overtime. Straight time earnings for outside day workers covered by this paragraph shall be the total daily normal shift earnings for seven hours and fifteen minutes divided by seven and one-quarter (7.25) hours.

(c) For all outside continuous employees who are engaged at power houses, sub-stations and pumps operating continuously for twenty-four (24) hours daily, and hoisting engineers, a work day of eight hours is established, including a staggered thirty minutes for lunch and without any intermission or suspension of operations throughout

the day. These eight hours shall be paid for at straight time rate. Overtime beyond eight hours per day and forty hours per week shall be paid for at time and one-half with no pyramiding of overtime. Straight time earnings for day workers covered by this paragraph shall be the total daily normal shift earnings for eight hours divided by eight (8) hours.

(d) All mine workers, whether employed by the month, day, or tonnage, yardage, deadwork or footage rate, shall receive Four Dollars and Seventy-five Cents (\$4.75) per day in addition to that provided for in the contract which expired March 31, 1946.

(e) Work performed on the sixth consecutive day is optional, but when performed shall be paid for at time and one-half or rate and one-half.

(f) Holidays, when worked, shall be paid for at time and one-half or rate and one-half. Holidays shall be computed in arriving at the sixth and seventh day in the week.

(g) Employees paid by the day or by the ton who start to work, that day shall be counted as a day's work in computing the sixth and seventh day in the week provided they do not leave their employment when work is available for them.

(h) Rockdusting shall be done at the expense of the coal operator.

Vacation Payment.

An annual vacation period shall be the rule of the industry. From Saturday, July 1, 1950, to Monday, July 10, 1950, inclusive, and from Saturday, June 30, 1951, to Monday, July 9, 1951, inclusive, and from Saturday, June 28, 1952, to Monday, July 7, 1952, inclusive, shall be vacation

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periods during which coal production shall cease. Day men required to work during this period at coke plants and other necessarily continuous operations or on emergency or repair work shall have vacations of the same duration at other agreed periods.

All employees with a record of one year's standing (June 1, 1949, to May 31, 1950, and June 1, 1950, to May 31, 1951, and June 1, 1951, to May 31, 1952, respectively) shall receive as compensation for each of the above-mentioned vacation periods the sum of One Hundred Dollars (\$100), with the following exception: Employees who entered the armed services prior to March 31, 1948, and who return to their jobs from the armed services during the qualifying period shall receive the \$100 vacation payment.

All the terms and provisions of district agreements relating to vacation pay for sick and injured employees are carried forward to this Agreement and payments are to be made in the sum as provided herein.

Pro rata payments for the months they are on the payroll shall be provided for those mine workers who are given employment during the qualifying period and those who leave their employment.

The vacation payment for each vacation period shall be made on the last pay day occurring in the month of June of that year.

Failure of any Operator signatory hereto to make full and prompt payments of the amounts required hereby, in the manner and on the dates herein provided, shall, at the option of the United Mine Workers of America, be deemed a violation of this Agreement. This obligation of each Operator signatory hereto, which is several and not joint, to so pay such sums, shall be a direct and continuing obligation of said Operator during the life of this Agree-

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ment; and it shall be deemed a violation of this Agreement if any mine, to which this Agreement is applicable, shall be sold, leased, sub-leased, assigned, or otherwise disposed of for the purpose of avoiding the obligation hereunder.

Checkoff.

The membership dues, including initiation fees, and assessments of the United Mine Workers of America and its various subdivisions, as authorized and approved by the International Union, United Mine Workers of America, shall be checked off the wages of the employees by the Operators covered by this contract and shall be remitted by the Operators to the properly designated officers of the Mine Workers for distribution to its various branches. Such remittances shall be accompanied by an itemized statement showing the name of each employee and the amount checked off for dues, initiation fees and assessments together with a list of employees from whom dues, initiation fees and assessments have not been collected.

In order that this section may become effective and operate within the limitations of the "Labor-Management Relations Act, 1947" the Mine Workers hereby agree to furnish, with all reasonable dispatch to the respective Operators, and the Operators agree to aid, assist and cooperate in obtaining written assignments from each employee so employed. Upon the presentation to the Operators of such assignments in such reasonable form as time and circumstances, looking to the continuous and uninterrupted production of coal, may allow, said Operators shall make deductions so authorized and deliver the same to the designated District officer of the Mine Workers or to such authorized representative as may be designated by the Mine Workers.

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District Agreements.

New Districts of the United Mine Workers of America may be established.

This Agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by reference; and all local agreements, rules, regulations and customs heretofore established in conflict with this Agreement are hereby abolished. Prior practice and custom not in conflict with this Agreement may be continued, but any provisions in District or Local Agreements providing for the levying, assessing or collecting of fines or providing for "no strike," "indemnity" or "guarantee" clauses or provisions are hereby expressly repealed and shall not be applicable during the term of this Agreement. Wherever a conflict arises between this Agreement and any District or Local Agreement, this Agreement shall prevail. When day men are transferred to loading coal the individual affected, if aggrieved, shall have the right of review under the settlement of disputes procedures provided in this Agreement.

No District Contract or Agreement negotiated hereunder shall become effective until approval of such Contract or Agreement by the International Union, United Mine Workers of America, has been first obtained.

Settlement of Local and District Disputes.

Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

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1. Between the aggrieved party and the mine management.

2. Through the management of the mine and the Mine Committee.

3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement.

House Coal.

House coal shall be sold to all employees, for their own household use, at the cost of production, exclusive of sales and administrative costs. Should any differences arise between the Mine Workers and the Operator of any mine as to the price so to be charged for said coal, such differences shall be settled under the terms of the Settlement of Disputes section of this Agreement.

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Miscellaneous.

1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any "no strike" or "Penalty" clause or clauses or any clause denominated "Illegal Suspension of Work" are hereby rescinded, cancelled, abrogated and made null and void.

2. Any and all provisions of any contracts or agreements between the parties hereto or some of them whether National, District, Local or otherwise providing for a protective wage clause and a modification of this Agreement or said agreements if a more favorable wage agreement is entered into by the United Mine Workers of America, are hereby rescinded, cancelled, abrogated and made null and void.

3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the "Settlement of Local and District Disputes" section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry.

4. The United Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement.

Exhibit No. 2

Termination of Agreement.

This agreement dated March 5, 1950, shall be effective as of March 5, 1950, and shall terminate June 30, 1952, Provided, However, That either the "Parties of the First Part" or "Party of the Second Part" may terminate this Agreement on or after April 1, 1951, by giving at least thirty (30) days' written notice to the other party of such desired earlier termination date.

The foregoing termination provision shall not be construed to limit or affect in any way the obligations of the parties relating to the termination of contracts under the "Labor-Management Relations Act, 1947."

• National Conférences. •

It is hereby stipulated and agreed by all parties signatory hereto that they, and each of them, will attend any conference or conferences held under the terms of this Agreement and that such conference or conférences shall be convened at Washington, District of Columbia, unless such place of meeting is changed by mutual agreement of the parties.

Integrated Instrument.

This Agreement is an integrated instrument and its respective provisions are interdependent and shall be effective from and after March 5, 1950.

In Witness Whereof, each of the parties signatory hereto, pursuant to proper authority, has caused this agreement to be signed by its proper officers or representatives at Washington, D. C., on this the 5th day of March, A. D., 1950.

EXHIBIT NO. 3.

**NATIONAL BITUMINOUS COAL WAGE AGREEMENT
OF 1950 AS AMENDED SEPTEMBER 29, 1952.**

Effective October 1, 1952.

Whereas on January 18, 1951, and at various dates subsequent thereto, certain coal associations, companies and individuals (generally referred to as "Operators"), in their association, company and individual names and capacities, executed with the United Mine Workers of America an Agreement denominated "National Bituminous Coal Wage Agreement of 1950 as Amended January 18th, 1951"; and said Operators, signatory to this Agreement, have now negotiated with the United Mine Workers of America certain additional amendments to said "National Bituminous Coal Wage Agreement of 1950" and it is the agreement and intent of all parties hereto to amend, and as amended, carry forward and preserve the terms and conditions of said "National Bituminous Coal Wage Agreement of 1950" and all previous Agreements as therein provided:

Now, Therefore, This Agreement made this 29th day of September, 1952, by and between the coal operators, associations, companies and individuals signatory hereto (hereinafter referred to as "Operators"), as parties of the first part, and the International Union, United Mine Workers of America (hereinafter referred to as "Mine Workers") on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements and, as amended, modified and supplemented, carries forward and preserves the terms and conditions of the "National Bituminous Coal Wage Agreement of 1950".

and all previous agreements as therein provided, such amendments, modifications and supplements being as follows, to wit:

Mine Safety Program.

Amend the "Mine Safety Program" section of the Agreement by striking out the language under subsection (d) following the word "injustice" and by striking out the language of subsection (c) and inserting in lieu thereof the following:

"(c) Review and Revision.

"In order to carry out the intent and purposes of the agreement affecting the Federal Mine Safety Code it is agreed that representatives of the United Mine Workers of America and the coal operators signatory hereto shall hold joint consultations with the United States Bureau of Mines looking toward review and appropriate revision of the Federal Mine Safety Code. Any revised code that is agreed upon between the aforementioned parties, when adopted by the parties, shall be adopted and incorporated by reference into this Agreement in place of the code adopted and incorporated in the National Bituminous Coal Wage Agreement of 1950 and continued under this Agreement."

Amend the "Mine Safety Program" section of the Agreement by amending subsection (f) to read as follows:

"(f) The International Union, United Mine Workers of America, may designate memorial periods not exceeding a total of ten (10) days during the term of this Agreement, provided it shall give proper notice to each district."

Exhibit No. 3

**United Mine Workers of America Welfare
And Retirement Fund of 1950.**

Amend the first printed paragraph of subsection A by striking out line four thereof the words and figures "thirty cents (30¢)" and inserting in lieu thereof the words and figures "forty cents (40¢)".

Amend the ninth printed paragraph of subsection A by striking out of line two thereof the words and figures "March 6, 1950," and inserting in lieu thereof the words and figures "October 1st, 1952"; and further amend said paragraph by striking out of line three thereof the words and figures "April 10, 1950" and inserting in lieu thereof the words and figures "November 10th, 1952."

Amend the sixth printed paragraph of subsection A by striking out of line two thereof the words "proper actuarial computations" and inserting in lieu thereof the words "the Trust's statistical experience."

Amend the tenth printed paragraph of subsection A by inserting after the words "shall be" in line two thereof the words "the Chief Executive Officer and".

Wages.

Amend the "Wages and Hours" section of the National Bituminous Coal Wage Agreement of 1950 by striking out of subsection (d) of said section the words and figures "Four Dollars and Seventy-five Cents (\$4.75)" and inserting in lieu thereof the words and figures "Eight Dollars and Twenty-five Cents (\$8.25)."

Amend the "Wages and Hours" section of the National Bituminous Coal Wage Agreement of 1950 by adding a new section to read as follows:

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"(i) It is understood and agreed that Roof Bolters will be paid the same day rates paid to Drillers and Shooters on mechanical crews."

Vacation Payment.

Strike out the first and second printed paragraphs and insert in lieu thereof the following:

"An annual vacation period shall be the rule of the industry. From Saturday, June 27, 1953 to Monday, July 6, 1953, inclusive, shall be a vacation period during which coal production shall cease. Day men required to work during this period at coke plants and other necessarily continuous operations or on emergency or repair work shall have vacations of the same duration at other agreed periods.

"All employees with a record of one year's standing (June 1, 1952 to May 31, 1953) shall receive as compensation for the abovementioned vacation period the sum of One Hundred Dollars (\$100)), with the following exception: Employees who enter the armed services and those who return from the armed services to their jobs during the qualifying period shall receive the \$100 vacation payment."

Seniority.

1. Seniority in principle and practice shall be recognized in the industry.

2. In all cases where the working force is to be reduced, employees in each job classification at a mine with the least service, shall be laid off first.

3. Employees who are idle because of a reduction in the working force shall be placed in a panel from which they shall be returned to employment on the basis of seniority.

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4. Seniority established by the employees previous to the layoff shall be retained and continued upon reemployment from the panel.

5. The reemployment of any idle person in a new classification is recognized fully, providing such person is qualified and is entitled otherwise to the position by reason of his seniority.

6. The superintendent of the mine and the secretary of the local union shall be joint custodians of the panel record.

7. In two or three shift operations the question of seniority with regard to work on the respective shifts shall be left to the discretion of the contracting parties at the mine in question.

8. Grievances under the seniority arrangements shall be handled in the usual way under the machinery of the contract providing for the consideration and disposition of grievances.

9. Any person in the panel list who secures casual or intermittent employment during the period when no work is available for him at the operation shall in no way jeopardize his seniority rights while engaged in such temporary employment. However, any person on the panel list who secures regular employment at another operation, or outside the industry, and does not return to work when there is available employment at the mine for those in said panel, shall sacrifice his seniority rights at the operation and shall have his name removed from the panel list.

Application of Contract to Coal Lands.

As a part of the consideration for this Agreement, the Operators signatory hereto agree that this Agreement

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covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said Operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this Agreement.

House Coal.

House coal shall be sold to all employees (including retired employees) of the mine, who live within a reasonable distance of the mine, for their own household use, at the cost of production, exclusive of sales and administrative costs. Should any differences arise between the Mine Workers and the Operator of any mine as to the price so to be charged for said coal, such differences shall be settled under the terms of the Settlement of Disputes section of this Agreement.

Miscellaneous.

Amend "Miscellaneous" by striking out subsection 4 and amending subsection 3 to read as follows:

"3. The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract pro-

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vided and by collective bargaining without recourse to the courts."

Amend "Miscellaneous" by adding thereto the following, to become subsection 4:

"4. Each operator signatory or who may become signatory hereto hereafter agrees to give proper notice to the President of the local union at the mine by the 18th day of each month that said Operator has made the required payment to the United Mine Workers of America Welfare and Retirement Fund for the previous month."

Termination of Agreement.

Amend the "Termination of Agreement" section of the National Bituminous Coal Wage Agreement of 1950 by striking out all of the said section below the caption and inserting in lieu thereof the following:

"This Amended Agreement dated September 29, 1952, shall be effective as of October 1, 1952, and is not subject to termination by any party signatory hereto prior to September 30, 1953. Provided, However, That either the parties of the first part or the party of the second part may, on or after September 30, 1953, terminate this Agreement by giving at least sixty (60) days' written notice to the other party of such desired termination date."

In Witness Whereof, each of the parties signatory hereto, pursuant to proper authority, has caused this Agreement effective October 1, 1952, to be signed by its proper officers or representatives at Washington, D. C., on this 29th day of September, 1952.

EXHIBIT NO. 4.

BENEDICT COAL CORPORATION.

St. Charles, Lee County, Virginia.

August 15, 1951.

This Contract Agreement by and between the Benedict Coal Corporation, St. Charles, Virginia, hereinafter referred to as party of the first part, and M. M. Campbell, Contractor, Kanawha County, West Virginia and Pennington Gap, Virginia, hereinafter referred to as party of the second part, entered into this 15th day of August 1951.

Whereas party of the second part agrees to perform the construction work necessary for an 80 ton slate disposal bin adjacent to the coal storage bin at the Benvir No. 5 mine of the party of the first part, and an aerial tram and bucket line for slate dumping into the next hollow to the east, including excavation, anchorage for cables, and foundations, under the following terms and conditions:

1. All construction work as outlined above in connection with this project is to be accomplished for the sum of \$12,500 which amount is to cover plans, use of tools, contractor services and labor. The party of the first part is to furnish construction supplies and materials through its purchasing agent according to bills of materials and specifications furnished him by the party of the second part.

2. It is agreed and understood between the parties that the second party will keep the management personnel of the party of the first part informed as to plans and specification, and said plans and specifications are subject to approval by said personnel as well as bills of material before purchase.

Exhibit No. 4

3. It is agreed and understood between the parties that party of the second part will carry adequate Workmens Compensation Insurance from a reliable insurance company, and will operate under the Compensation laws of the State of Virginia, thereby relieving the party of the second part of responsibility in case of accident. Second party is to furnish proof of coverage before work begins.

4. It is agreed and understood that party of the second part will begin work at the earliest possible date, and to push this project to completion consistent with weather conditions and the working of an efficient labor force under the amount of money advanced from week to week by the party of the first part. It is estimated that this project will require approximately 20 to 22 weeks, with no penalties for delays due to inclement weather.

5. It is understood and agreed by and between the parties that party of the first part is to furnish money to the party of the second part at the end of each weeks work for the purpose of meeting payrolls, the amount furnished to be applied against the total amount as outlined in paragraph 1 above, plus \$125.00 per week of 5 days or \$25.00 per working day for days worked as an allowance to cover use and maintenance of tools and services as boss of the party of the second part. Party of the second part is to keep his own records and payrolls, and is to also apply the \$25.00 per day allowances against the amount set forth above for the completed project.

6. It is agreed and understood by and between the parties that any additional construction work, such as excavations and foundations, concrete pouring, additional bins or buildings, performed by party of the second part for party of the first part, will be agreed upon separately, but will be executed and carried out by second party under

Exhibit No. 4

the terms and conditions of this contract agreement. It is also agreed that the additional time for such projects will not be counted as against the time referred to in paragraph 4.

7. It is agreed and understood that responsibility for completion of this construction project rests upon the party of the second part, and that upon completion, operating tests will be made to insure satisfaction of the first party before acceptance by party of the first part.

Witness hereunder by signatures of the parties hereto, this Contract Agreement, to be made binding upon both parties, this 15th day of August, 1951.

BENEDICT COAL CORPORATION,

By /s/ GUY B. DARST,

Vice President,

M. M. CAMPBELL, Contractor,

By /s/ M. M. CAMPBELL.

Subscribed and sworn to before me this 15th day of August, 1951.

/s/ DEXTER RAINS,

Seal

Notary Public.

My commission expires 2/16/55.

Exhibit No. 10

EXHIBIT NO. 8.

Cost of Strikes.

Cost Per Ton Basis.

Strike	Actual Cost Per Ton	Per Ton Cost If Prod. Not Lost	Difference in Cost x Tons	Total Cost
Apr. 14-17, '50.....	\$6.397	\$6.240	\$.157 x 23044	\$ 3,617.90
Sept. 27-29, '50.....	6.501	6.279	.282 x 14465	4,075.18
Jan. 10-11, '51.....	5.824	5.643	.181 x 23416	4,238.24
July 30-31, '51.....	5.264	5.142	.122 x 13516	1,648.95
Oct. 1- 8, '51.....	6.110	5.746	.364 x 18272	6,651.01
Nov. 2- 7, '51.....	5.729	5.507	.222 x 16053	3,563.76
Feb. 7- 8, '52.....	6.120	6.008	.122 x 17635	2,151.47
Apr. 24-25, '52.....	6.083	5.954	.129 x 18647	2,405.66
Other Loss Due to Abandonment of Constr.....				21,534.85
Aug. 5- 6, '52.....	5.907	5.721	.186 x 9668	1,798.25
Oct. 16-23, '52.....	6.581	5.855	.726 x 15573	11,306.65
May 18-27, '53.....	7.503	6.679	.824 x 10186	8,393.26
Other Losses—Business—Profit.....				(3,632.50)
Total Direct Cost.....				\$75,017.68
Lost Cable				6,000.00
				<hr/> \$81,017.68

EXHIBIT NO. 10.

**NATIONAL BITUMINOUS COAL WAGE AGREEMENT
OF 1950 AS AMENDED JANUARY 18TH, 1951.**

Effective February 1, 1951.

Whereas on March 5, 1950, and at various dates subsequent thereto certain coal associations and companies (generally referred to as Operators), in their association and company names and capacities, executed with the United Mine Workers of America the National Bituminous Coal Wage Agreement of 1950 (dated March 5, 1950); and subsequent to becoming signatories to said Agreement many of said signatory operators affiliated with and became mem-

Exhibit No. 10

bers of a newly created Association denominated and known as the "Bituminous Coal Operators' Association" and authorized said Association by and through its President, Harry M. Moses, to officially represent said members, companies and associations in the negotiation of wage agreements with the United Mine Workers of America; and:

Whereas said "Bituminous Coal Operators' Association," in behalf of each and all of its members of every kind and character (whether association, company, partnership or individual) has negotiated with the United Mine Workers of America certain amendments to said National Bituminous Coal Wage Agreement of 1950;

Now, Therefore, This Agreement made this 18th day of January, 1951, by and between the Bituminous Coal Operators' Association (for and on behalf of each of the named and described associations and companies listed in "Appendix A," hereto attached and made a part hereof) and by and between such other and additional associations, companies and operators as may hereafter become signatory hereto, hereinafter referred to as "Operators," as parties of the first part, and the International Union, United Mine Workers of America, hereinafter referred to as "Mine Workers," on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, and, as amended, carries forward and preserves the terms and conditions of the National Bituminous Coal Wage Agreement of 1950, such amendments, being as follows, to wit:

Wages.

Amend the "Wages and Hours" section of the National Bituminous Coal Wage Agreement of 1950 by striking out

Exhibit No. 11

of subsection (d) of said section the words and figures "Four Dollars and Seventy-five Cents (\$4.75)" and inserting in lieu thereof the words and figures "Six Dollars and Thirty-five Cents (\$6.35)."

Termination of Agreement.

Amend the "Termination of Agreement" section of the National Bituminous Coal Wage Agreement of 1950 by striking out all of the said section below the caption and inserting in lieu thereof the following:

"This Amended Agreement dated January 18th, 1951, shall be effective as of February 1, 1951, and is not subject to termination by any party signatory hereto prior to March 31st, 1952, Provided, However, that either the parties of the first part or the party of the second part may, on or after March 31st, 1952, terminate this Agreement by giving at least sixty (60) days' written notice to the other party of such desired termination date."

In Witness Whereof, each of the parties signatory hereto, pursuant to proper authority, has caused this Agreement effective as of February 1, 1951 to be signed by its proper officers or representatives at Washington, D. C., on this the 18th day of January, 1951.

EXHIBIT NO. 11.

**NATIONAL BITUMINOUS COAL WAGE
AGREEMENT.**

Effective April 1, 1945.

Executed in the City of Washington, D. C., April 11, 1945.

This Agreement, made this 11th day of April, 1945, between the Coal Operators and Associations signatory

Exhibit No. 11

hereto, represented in the National Bituminous Coal Wage Conference, parties of the first part, and the United Mine Workers of America, parties of the second part, covering all of the bituminous coal mines of the United States represented in said Conference, amends and supplements all agreements as herein provided. This Agreement carries forward and preserves the terms and conditions contained in all Joint Wage Agreements effective April 1, 1941, to March 31, 1943, the Supplemental Agreement providing for the Six-Day Workweek, and all of the various District Agreements executed between the United Mine Workers of America and the various coal associations and coal companies (based upon the aforesaid basic agreement) as they existed on March 31, 1943, and as amended and supplemented by the Agreement herein set out.

Witnesseth:

• • • • •

3. Time and one-half or rate and one-half shall not be paid for Saturday work if the individual mine worker has not worked on Monday, Tuesday, Wednesday, Thursday or Friday of the week.

• • • • •

13. If the United Mine Workers make a wage agreement during the period of this Agreement, covering wages or working conditions with any person, corporation, association or district, more favorable to the Operators than as contained herein, then this Agreement shall be modified so that the Operators who are parties hereto shall receive all of the benefits of such more favorable agreement.

• • • • •

EXHIBIT NO. 14.

SOUTHERN WAGE AGREEMENT.

Effective April 1, 1941, to March 31, 1943.

Executed in the City of Washington, D. C., July 5, 1941.

Southern Wage Agreement.

Washington, D. C., July 5, 1941.

This Agreement, made the 5th day of July, 1941, between the Operators' Association of Williamson Field, Big Sandy-Elkhorn Coal Operators' Association, Hazard Coal Operators' Association, Harlan County Coal Operators' Association, Kanawha Coal Operators' Association, Logan Coal Operators' Association, Southern Appalachian Coal Operators' Association, New River Coal Operators' Association, Pocahontas Operators' Association, Winding Gulf Operators' Association, Greenbrier Coal Operators' Association, Upper Buchanan Smokeless Coal Operators' Association, and Virginia Coal Operators' Association, voluntary associations on behalf of each member thereof hereinafter referred to as the Operators, party of the first part, and the International Union, United Mine Workers of America, and Districts 17, 19, 28 and 30, hereinafter referred to as the Mine Workers and on behalf of each member thereof, party of the second part. (New districts of the United Mine Workers may be established in this territory.)

Witnesseth: It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties as heretofore defined and set forth in this Agreement. It is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency representing the employees of the parties of the first part. It is

agreed that as a condition of employment all employees shall be members of the United Mine Workers of America, except in those exempted classifications of employment as provided in this contract. (See Note.) It is the intent and purpose of the parties hereto that this Agreement will promote an improved industrial and economic relationship in the bituminous coal industry, and to set forth herein the basic agreements covering rates of pay, hours of work, and conditions of employment to be observed between the parties in the following territory: Southern West Virginia, Virginia, Northern Tennessee, and that part of Kentucky lying east of a line drawn north and south through the City of Louisville.

(Note.) The amendments to the enabling clause of the Basic Agreement, covering recognition of the United Mine Workers of America, do not change the rules or practices of the industry pertaining to management. The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood.

* * * * *

Mine Committee.

A committee of three (3) Mine Workers, who shall be able to speak and understand the English language, shall be elected at each mine by the Mine Workers employed at such mine. Each member of the Mine Committee shall be an employe of the mine at which he is a committee member, and shall be eligible to serve as a committee member only so long as he continues to be an employe of said mine. The duties of the Mine Committee shall be confined to the adjustment of disputes arising out of this Agreement and the mine management and the Mine Worker, or Mine Workers, have failed to adjust. The Mine Committee shall have no other authority or exercise any other control, nor

Exhibit No. 14

in any way interfere with the operation of the mine; for violation of this clause any or all members of the Committee may be removed from the Committee.

Settlement of Disputes.

Should differences arise between the Mine Workers and the Operator as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at any mine, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately:

First: Between the aggrieved party and the mine management;

Second: Through the management of the mine and the Mine Committee;

Third: By a Board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

Should the Board fail to agree, the matter shall be referred to an umpire selected by said Board. Should the Board be unable to agree on the selection of an umpire, he shall be designated by the International President of the United Mine Workers of America and the President of the Operators' Association affected. The decision of the umpire in any event shall be final.

District conferences may establish an intermediate board consisting of two (2) commissioners, one representing the Operators and one representing the Mine Workers with such powers as said Conference may delegate.

Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute; and a decision

Exhibit No. 14

reached at any stage of the proceeding shall be binding on both parties hereto, and shall not be subject to reopening by any other party or branch of either association except by mutual agreement.

Expense and salary incident to the services of an umpire shall be paid jointly by the Operators and Mine Workers in each District.

* * * * *

Illegal Suspension of Work.

A strike or stoppage of work on the part of the Mine Workers shall be a violation of this Agreement. Under no circumstances shall the Operator discuss the matter under dispute with the Mine Committee or any representative of the United Mine Workers of America during suspension of work in violation of this Agreement.

* * * * *

Seniority.

Seniority, in principle and practice as it has been recognized in the industry, is not modified or changed by this Agreement.

Seniority affecting return to employment of idle employees on a basis of length of service and qualification for the respective positions brought about by different mining methods or installation of mechanical equipment is recognized. Men displaced by new mining methods or installation of new mechanical equipment so long as they remain unemployed shall constitute a panel from which new employees shall be selected.

District Conferences shall arrange to incorporate in the several District agreements such rules and formulae as may be necessary to implement and effectuate this provision.

* * * * *

EXHIBIT NO. 15.

**NATIONAL BITUMINOUS COAL WAGE
AGREEMENT OF 1947.**

Effective July 1, 1947, to June 30, 1948.

Executed at Washington, D. C., July 8, 1947.

This Agreement, made this 7th day of July, 1947, by and between the coal operators and associations signatory hereto hereinafter referred to as Operators, parties of the first part, and the International Union, United Mine Workers of America, hereinafter referred to as Mine Workers, on behalf of each member thereof, party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements previous agreements as herein provided. This Agreement (subject to the amendments, modifications and supplements as hereinafter provided) carries forward and preserves the terms and conditions of the Appalachian Joint Wage Agreement (dated June 19, 1941), effective April 1, 1941, to March 31, 1943, the Supplemental Six-Day Work Week Agreement, the National Bituminous Coal Wage Agreement (dated April 11, 1945), effective April 1, 1945, and all the various District Agreements executed between the United Mine Workers of America and the various Operators and Coal Associations (based upon the aforesaid basic agreements) as they existed on March 31, 1946, subject to the terms and conditions of this Agreement and as amended, modified and supplemented by this Agreement as herein set out.

Witnesseth: It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties, as defined and set forth in this Agreement. It is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency representing the em-

Exhibit No. 15

employees of the parties of the first part. It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, except in those exempted classifications of employment as hereinafter provided in this Agreement. This provision does not change the rules or practices of the industry pertaining to management. The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood. It is the intent and purpose of the parties hereto that this Agreement will promote and improve industrial and economic relationship in the bituminous coal industry and to set forth herein the basic agreements covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed in the bituminous coal mines covered by this Agreement during such time as such persons are able and willing to work.

* * * * *

District Agreements.

New Districts of the United Mine Workers of America may be established.

This Agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by reference; and all local agreements, rules, regulations and customs heretofore established in conflict with this Agreement are hereby abolished. Prior practice and custom not in conflict with this Agreement may be continued, but any provisions in District or Local Agreements providing for the levying, assessing or collecting of fines or providing for "no strike," "indemnity" or "guarantee" clauses or provisions are hereby expressly repealed and shall not be applicable during the term of this Agreement. Wherever a conflict arises between this Agreement and any District or Local Agreement, this Agreement shall prevail. When day men are transferred to loading coal the individ-

Exhibit No. 15

ual affected, if aggrieved, shall have the right of review under the settlement of disputes procedures provided in this Agreement.

No District Contract or Agreement negotiated hereunder shall become effective until approval of such Contract or Agreement by the International Union, United Mine Workers of America, has been first obtained.

Settlement of Local and District Disputes.

Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

1. Between the aggrieved party and the mine management.

2. Through the management of the mine and the Mine Committee.

3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and

Exhibit No. 15

salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement.

* * * * *

Miscellaneous.

1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any "no strike" or "Penalty" clause or clauses or any clause denominated "Illegal Suspension of Work" are hereby rescinded, cancelled, abrogated and made null and void.

2. Any and all provisions of any contracts or agreements between the parties hereto or some of them, whether National, District, Local or otherwise, providing for a protective wage clause and a modification of this Agreement or said agreements if a more favorable wage agreement is entered into by the United Mine Workers of America, are hereby rescinded, cancelled, abrogated and made null and void.

3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the Settlement of Local and District Disputes" section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry.

* * * * *

Exhibit No. 32

EXHIBIT NO. 30.

UNITED MINE WORKERS OF AMERICA.

Norton, Virginia.

May 27, 1953.

Mr. John L. Lewis, President
United Mine Workers of America
United Mine Workers' Building
Washington 5, D. C.

Dear Sir and Brother:

On May 20 Mr. Guy Darst, Vice-President of the Benedict Coal Corporation, St. Charles, Lee County, Virginia, wrote you that his company was holding the United Mine Workers of America responsible for an illegal work stoppage.

I am enclosing a copy of letter which I addressed to Mr. Darst on May 26 for your information relative to this subject.

With kind personal regards, I am

Fraternally yours,

/s/ ALLEN CONDRA

ALLEN CONDRA, President
District 28, U. M. W. A.

AC:HJ

Enclosure

EXHIBIT NO. 32.

**UNITED MINE WORKERS OF AMERICA—
DISTRICT 28.**

Grievance Report.

Local Union No.: 6372. Location: St. Charles, Virginia.

Coal Company: Benedict Coal Corp. Name of Mine: No. 5.

Exhibit No. 32

Superintendent: Mine Foreman:

Date case taken up with Foreman by Complainant:

Case stated by complaining member to Foreman: Page 51
of Agreement violated. Melvin Roark and Jasper Anders.
Accidently let motor get away from them and wrecked
and Company refused to compensate them for their
lost time. Date involved: August 5th, 1952. Co. refused
to compensate them for their lost time.

Answer of Foreman:
.....

Settled at Mine.

..... Satisfactory Settlement:
Yes No

Date Mine Committee took up case with Mine Management:
.....

Mine Committee report of case with Superintendent or
Foreman:
.....

Decision of Board of Arbitration:
.....
..... Date:

Decision of Umpire:
.....
..... Date:

This side to be filled in by Mine Committee.

Mine Committee:
GRANT MULLINS,
FRED TYLER,
JIM SCOTT.

Grievance:

Name of Complainant: Melvin Roark and Jasper Anders.

Address: St. Charles, Va.

Exhibit No. 32

Class of Work: Trackmen.

Section of contract violated: Discharge.

Date grievance taken up by field worker: August 6, 1952.

State nature of grievance in detail and settlement, if any:

Co. discharged men for running motor over hill, stated they were careless and unsafe. Co. reconsidered and converted discharge to 5 day penalty, work stoppage occurred, the two men involved by penalty actually lost 3 days work and have claim for same. Co. contends they have a right under the contract to penalize men for such action. Mine Comm. Contends this accident was unavoidable under circumstances of its occurrences and that no penalties should be applied.

Satisfactory settlement has been reached:	.....	No
	Yes	No
The above case has been referred to the	Yes	
Joint Board of Arbitration: .....	.....
	Yes	No

This side to be filled in by Field Worker.

M. W. CLARK,
Field Worker.

Pennington Gap, Va.
November 15, 1952.

Mr. Allen Condra, Pres.
Dist. 28, U. M. W. A.
Norton, Va.

Dear Sir and Brother:

The Mine Committee at Benedict mine Local No. 6372 has verified the report made by Mr. Guy Darst, Supt. Bene-

Exhibit No. 32

dict Coal Co. of the settlement of the grievance at that mine concerning the two men, who were laid off for handling motor unsafely.

The two man who were laid off agreed to dismiss their claim for pay, the company having agreed to permit them to make up by extra shifts more time than was lost at the time layoff was applied.

This report is rendered so that you may avoid arrangements for board hearing on this grievance.

Fraternally Yours,

M. W. CLARK,

M. W. CLARK,

Acting Dist. Rep.,

Dist. 28, U. M. W. A.

(Copy)

(Case No. 1)

**UNITED MINE WORKERS OF AMERICA
DISTRICT NO. 28.**

Date: Aug 7th 1952

Grievance Report Form.

Local Union No. 6372. Located at St. Charles, Va.

Name of Secretary: Bradley Phillips.

Name of Company: Benedict Coal Corp. Mine No. 5.

Grievance:

(1) Section of Agreement violated: Page 51, Melvin Roark and Jasper Anders.

(2) State grievance in detail, specifying all dates involved: Accidently Let Motor Get away from them and

Exhibit No. 37

Wrecked and co refuses to compantsate them For ther lost
time Date Involed: Aug 5th 1952.

Settled at Mine

Remarks, reason for disagreement: Co Refused to Com-
pensate These Men For ther lost Time.

We the Mine Committee at the above mentioned mine
have disagreed with the Superintendent of the above-men-
tioned, Company, and refer this question to the Office of
the President of District No. 28, United Mine Workers of
America, for proper adjustment, all other requirements
under District Wage Agreement in effect having been com-
plied with.

Date Received

District Office

Date Filed

Arbitration Board

Names of Mine Committee:

GRANT MULLINS, Chairman,
FRÉD TYLOR,
JIM SCOTT.

EXHIBIT NO. 37.

Period	Tonnage Produced	Claimed Cost Reduction	Total Cost Reduction
April, 1950.....	20,468.5	.157	\$ 404.35
Sept., 1950.....	12,269.9	.282	615.07
Jan., 1951.....	20,896.9	.181	545.89
July, 1951.....	11,828.0	.122	205.93
Oct., 1951.....	13,508.5	.364	1,733.92
Nov., 1951.....	14,271.4	.222	351.11
Feb., 1952.....	16,033.6	.122	195.37
Apr., 1952.....	16,631.4	.129	260.15
Aug., 1952.....	8,460.0	.186	224.69
Oct., 1952.....	9,489.0	.726	4,417.64
May, 1953.....	6,114.4	.824	3,354.99
			<u>12,309.11</u>

EXHIBIT 38.

	Actual Tonnage	Average Sales Price Per Ton	Average Actual Cost Per Ton	Average Actual Gain or (Loss) Per Ton	Actual Sales	Actual Total Costs	Actual Gain	Actual Loss
April, 1950.....	20,468.5	\$5.608	\$6.397	\$ (.789)	\$114,785.31	\$130,936.92	.....	\$16,151.61
Sept., 1950.....	12,269.9	5.712	6.561	(.849)	70,085.02	80,505.75	.....	10,420.73
Jan., 1951.....	20,896.9	5.532	5.824	(.292)	115,598.83	121,694.71	.....	6,095.88
July, 1951.....	11,828.0	5.563	5.264	.299	65,803.37	62,259.35	\$3,544.02	.....
Oct., 1951.....	13,508.5	5.705	6.110	(.407)	77,067.94	82,532.43	.....	5,464.49
Nov., 1951.....	14,271.4	5.798	5.729	.069	82,745.85	81,754.47	991.38	.....
Feb., 1952.....	16,033.6	5.492	6.130	(.638)	88,064.28	98,283.03	.....	10,218.75
Apr., 1952.....	16,631.4	5.370	6.083	(.713)	89,317.55	101,164.67	.....	11,847.12
Aug., 1952.....	8,460.0	5.315	5.907	(.592)	44,962.39	49,972.94	.....	5,010.55
Oct., 1952.....	9,489.0	6.312	6.581	(.269)	59,897.35	62,448.00	.....	2,550.65
May, 1953.....	6,114.4	5.557	7.503	(1.946)	33,975.53	45,879.66	.....	11,904.13

EXHIBIT NO. 39.

	Av. Sales Price Per Ton	Total Projected Tonnage	Av. Proj. Cost Per Ton	Av. Proj. Gain— (Loss) Per Ton	Projected Total Sales	Projected Total Costs	Projected Gain	Projected Loss
April, 1950.....	\$5.608	23,044	\$6.240	\$ (.632)	\$129,230.75	\$143,794.56	\$	\$14,563.81
Sept., 1950.....	5.712	14,465	6.279	(.567)	82,623.08	90,825.74	.....	8,202.66
Jan., 1951.....	5.532	23,416	5.643	(.111)	129,537.31	132,136.49	.....	2,599.18
July, 1951.....	5.563	13,516	5.142	.321	75,189.51	69,499.27	5,690.24	.....
Oct., 1951.....	5.705	18,272	5.746	(.041)	104,241.76	104,990.91	.....	749.25
Nov., 1951.....	5.798	16,053	5.507	.291	93,075.29	88,403.87	4,671.42	.....
Feb., 1952.....	5.492	17,635	6.008	(.516)	96,851.42	105,951.08	.....	9,099.66
April, 1952.....	5.370	18,647	5.954	(.584)	100,234.39	111,024.24	.....	10,789.85
Aug., 1952.....	5.315	9,668	5.721	(.406)	51,385.42	55,310.63	.....	3,925.21
Oct., 1952.....	6.312	15,573	5.855	.457	98,296.78	91,179.92	7,116.86	.....
May, 1953.....	5.557	10,186	6.679	(1.122)	56,603.60	68,032.29	.....	11,428.69

Exhibit No. 39

Exhibit No. 40

EXHIBIT NO. 40.

	Losses Claimed	Corrected Figures	Savings on Total Losses
Apr., 1950.....	\$ 3,617.90	\$ 2,030.09	\$ 1,587.81
Sept., 1950.....	3,975.18	1,757.11	2,218.07
Jan., 1951.....	4,238.24	741.54	3,496.70
July, 1951.....	1,648.95	497.27*	2,146.22
Oct., 1951.....	6,651.01	1,935.77	4,715.24
Nov., 1951.....	3,563.76	116.28*	3,680.04
Feb., 1952.....	2,151.47	1,032.38	1,119.09
Apr., 1952.....	2,405.66	1,348.39	1,057.27
Aug., 1952.....	1,798.25	712.91	1,085.34
Oct., 1952.....	11,306.65	1,639.14	9,667.51
May, 1953.....	8,393.26	7,917.82	475.44
Totals	<u>\$49,750.33</u>	<u>\$18,501.60</u>	<u>\$31,248.73</u>
			21,534.85
			3,632.50
			6,000.00
			<u>\$62,416.08</u>

* Loss.

Appellants' Joint Statement of Parts of Record, etc.

Nos. 13,055 and 13,056.

In the
UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

JOHN L. LEWIS et al., Trustees,
Appellants,

vs.

BENEDICT COAL CORPORATION,
Appellee,

vs.

UNITED MINE WORKERS OF
AMERICA and UNITED MINE
WORKERS OF AMERICA, DIS-
TRICT 28,

Appellants.

On Appeal from
the United
States District
Court for the
Eastern Dis-
trict of Ten-
nessee, North-
eastern Divi-
sion.

**APPELLANTS' JOINT STATEMENT OF THE PARTS
OF THE RECORD APPELLANTS INTEND TO
PRINT AS AN APPENDIX TO THEIR BRIEFS.**

To: Mr. S. J. Milligan,
Attorney at Law,
Greeneville, Tennessee,

and

Mr. Robert T. Winston,
Attorney at Law,
Norton, Virginia,

Attorneys for the Appellee,
Benedict Coal Corporation.

In accordance with Rule 16, section 2 (f) of the Court,
you are notified that the appellants intend to print the
following portions of the record in the appendix to its
brief:

Appellants' Joint Statement of Parts of Record, etc.

1. Statement of Docket entries.
2. The complaint, omitting the exhibits thereto.
3. The answer and counterclaim of the defendant, Benedict Coal Corporation.
4. The order of the Court entered October 29, 1954.
5. The cross-claim of the cross-plaintiff, Benedict Coal Corporation.
6. The answer of plaintiffs to counterclaim.
7. The first amendment to the cross-claim.
8. The second amendment to the cross-claim.
9. The answer of the cross-defendants to the cross-claim as amended by the first and second amendments.
10. Order pursuant to pretrial.
11. Third amendment to the cross-claim.
12. Motion for summary judgment by the plaintiffs.
13. Amended pretrial order.
14. Amendment to answer of cross-defendants.
15. Opinion of the Court overruling the plaintiffs' motion for summary judgment in part and sustaining said judgment in part.
16. Verdict form.
17. Judgment.
18. Plaintiffs' motion to amend judgment.
19. Cross-defendants' motion for a new trial.
20. Order overruling plaintiffs' motion to amend judgment.
21. Order overruling cross-defendants' motion for a new trial.

Appellants' Joint Statement of Parts of Record, etc.

22. Order amending order overruling motion to amend judgment.

23. The transcript of proceedings, volume 1, page 13 through page 333.

24. The transcript of proceedings, volume 2, page 334 through page 591.

25. The transcript of proceedings, volume 3, page 592 to line 8, page 638; page 644 through page 855.

26. Exhibit No. 2 (National Bituminous Coal Wage Agreement of 1950).

27. Exhibit No. 3 (National Bituminous Coal Wage Agreement as amended September 29, 1952).

28. Exhibit No. 4 (Benedict and Campbell Contract).

29. Exhibit No. 8 (Calendar and costs).

30. Exhibit No. 10. (National Bituminous Coal Wage Agreement as amended January 18, 1951).

31. Exhibit No. 11 in part (National Bituminous Wage Agreement of 1945—the caption and first paragraph; paragraphs numbered 3 on page 2 and 13 on page 3).

32. Exhibit No. 14 in part (Southern Wage Agreement—the caption and introductory paragraphs; the sections entitled "Mine Committee," page 3; "Settlement of Disputes," page 3; "Illegal Suspension of Work," page 4; "Seniority," page 5).

33. Exhibit No. 15 in part (National Bituminous Coal Wage Agreement of 1947—the caption and introductory paragraphs; the sections entitled "District Agreements," page 6, "Settlement of Local and District Disputes," pages 6, 7; "Miscellaneous," page 7).

34. Exhibit No. 30 in part (Letter of 5/27/53 from Allen Condra to John L. Lewis).

Appellants' Joint Statement of Parts of Record, etc.

- 35. Exhibit No. 32 (Grievance Form).
- 36. Exhibit No. 37 (Tabulated Sheet).
- 37. Exhibit No. 38 (Chart).
- 38. Exhibit No. 39 (Chart).
- 39. Exhibit No. 40 (Chart).
- 40. This designation of the record.

s/ E. H. RAYSON,

s/ R. R. KRAMER,

Attorneys for Appellants,

Trustees, United Mine Workers of
America Welfare and Retirement
Fund;

United Mine Workers of America;
United Mine Workers of America,
District 28.

WILLARD P. OWENS,

KRAMER, DYE, McNABB & GREENWOOD,

Of Counsel to the

Appellants, United Mine Workers of America, and
United Mine Workers of America, District 28.

VAL J. MITCH,

HAROLD H. BACON,

KRAMER, DYE, McNABB & GREENWOOD,

Of Counsel to the

Appellant, United Mine Workers of America Welfare
and Retirement Fund.

Copy of the foregoing was served upon the appellee by
mailing the same, postage prepaid, to Mr. S. J. Milligan,
and Mr. Robert T. Winston, attorneys of record for the
appellee.

This November 28, 1956.

s/ E. H. RAYSON,

Attorney.

Appearances

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee,
Northeastern Division.

JOHN L. LEWIS, CHARLES A. OWEN,
JOSEPHINE ROCHE, Trustees of the
United Mine Workers Welfare and
Retirement Fund, Plaintiffs,

vs.

THE BENEDICT COAL CORPORATION,
Defendant-Cross Plaintiff,

vs.

UNITED MINE WORKERS OF AMER-
ICA, and UNITED MINE WORKERS
OF AMERICA, District No. 28,
Cross-Defendants.

No. 944—Civil.

TRANSCRIPT OF PROCEEDINGS.

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Appearances:

For the Plaintiffs, Cross-Defendants:

Kramer, Dye, McNabb & Greenwood, Knoxville,
Tennessee,

R. R. Kramer, Esq.,

E. H. Rayson, Esq.,

J. N. Hardin, Esq.,

Of Counsel.

For the Defendant, Cross-Plaintiff:

Greear, Bowen, Mullins & Winston,
Norton, Virginia,

Robert T. Winston, Jr., Esq.,

S. J. Milligan, Esq.,

Of Counsel.

* Numbers appearing in outer edge of text indicate page numbers of original stenographic transcript of testimony.

Proceedings

This cause came on to be heard before the Honorable Robert L. Taylor, Judge of the United States District Court, Eastern District of Tennessee, Northeastern Division, and jury, on March 19, 1956, and succeeding days, when the following proceedings were had, to-wit:

3

First Day of Trial.

March 19, 1956

(Whereupon, at 9:12 a. m. Court convened pursuant to adjournment and the following proceedings were had.)

The Court: Call the case, Mr. Clerk.

The Clerk: John L. Lewis, Charles A. Owen, Josephine Roche, Trustees, of the United Mine Workers Welfare and Retirement Fund, Plaintiffs vs. The Benedict Coal Corporation, Defendant-Cross Plaintiff, vs. United Mine Workers of America, and United Mine Workers of America District No. 28, Cross-Defendants, Civil Action No. 944.

The Court: Are the parties ready?

Mr. Kramer: The original plaintiffs are ready, your Honor.

Mr. Winston: Benedict is ready, defendant and cross-plaintiff.

Mr. Kramer: Defendants to the cross-claim are ready, your Honor.

Before your Honor calls the jury, your Honor is familiar with the nature of this case and I want at this time to make inquiry as to the number of challenges. I think this is one of the type cases at Section 1870 of the Judicial Code is intended to cover under which the Court may grant additional challenges. We are asking for that right under Section 1870 of Title 28 of the Judicial Code, your Honor.

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Would your Honor like to see the section?

The Court: Yes, I would. Well, I don't see any need for any extra challenges.

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(Whereupon, counsel presented argument to the Court.)

The Court: Call the jury.

(Whereupon, a jury ~~was~~ qualified, selected and impaneled.)

(Whereupon, the witnesses were sworn and the rule having been requested, excused from the court room.)

Mr. Kramer: Your Honor, I want to keep this gentleman as the representative of the United Mine Workers, International, and I will keep Mr. Boyle as representative of District No. 28.

Mr. Milligan: What is this gentleman's name?

Mr. Kramer: Breeding. Also of the International union. Both hold official positions and I am asking to keep them as representatives of these two defendants.

The Court: All right.

Mr. Kramer: At the moment I do not have a representative here for the Trustees. I may have one later.

Mr. Winston: We request to keep Mr. Guy Darst,
5 who is vice-president of Benedict.

The Court: All right.

Mr. Kramer: There is a matter of procedure we would like to present out of the presence of the jury, if we may at this moment, before statements of counsel are made.

The Court: Let the jury be excused temporarily. Wait just a minute. I want to talk to them before they are excused.

Lady and gentlemen, I want you to keep these instructions that I am about to give you in mind and follow them closely until this suit is over. Don't let anybody talk to you during this trial about the lawsuit. Don't talk to anyone during this trial about the lawsuit. If anyone undertakes to mention the suit to you, you immediately tell them, whoever it is, that you are on the jury and not to mention the suit. If that person should undertake to persist in talking to you I want you to report it to the Court immediately.

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And if you know counsel, any of the attorneys here it is better not to talk to them about any personal matter, the weather or anything else, during the course of this trial. It is better after the trial. If you know counsel, of course, it is perfectly proper to talk to them then.

6 And don't undertake to decide the lawsuit in your own mind until you have heard all of the proof and argument of counsel and the charge of the Court. Now if there happens to be anything in the newspapers about the lawsuit or on the radio or television, don't read the newspaper, don't listen to the radio or look at television until this suit is over.

This suit, like all suits, of course, must be decided from the evidence that comes from the witness stand through the witnesses as they are introduced and under the applicable law to be given to you by the Court. And keep those instructions in mind and follow them strictly until you reach a verdict in this lawsuit. Now you may be excused temporarily.

(Whereupon, the jury was excused from the court room and the following proceedings were had, to-wit:)

Mr. Kramer: As your Honor is fully aware this case is complicated, many issues are in it. We feel this is a case on which the suit in issue should be submitted to the jury on special issues, and we have taken considerable time and prepared special issues.

(Whereupon, counsel presented argument to the Court.)

The Court: Of course, I will let the jury return a verdict like any other lawsuit. On the original suit I am
7 going to submit it on the question of whether or not these employees violated this contract; if so, did they cause this Benedict any damage, and if so what is the amount of the damage, and whether or not the International union—for convenience the big union—acquiesced and concurred in this strike, whether or not the District

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concurrent, if so is that a breach of the contract, was that a breach of the contract, if so did it result in damages to this Benedict Coal Corporation, if so, how much.

Then on the question of cross claim, I am going to submit to the jury whether or not these unions breached this contract, and if so did it cause damage to the Benedict Coal Corporation, if so was the damage caused in the contemplation of the parties and foreseeable under the common law rule by the parties, and if so what is the amount.

Those are the general propositions I am going to submit to the jury.

Mr. Kramer: I don't want to ask your Honor to prejudge, but as I understand your Honor's position at the moment is that the question of extent of damage, if there were work stoppages or violations of the agreements or either of them, is also to be considered for what defense proof comes on, on the question of not only whether
8 or not there could be a recovery by the Trustees but on the amount of recovery upon the theory of offset.

The Court: Right. Offset as to the original complaint, and I will let it go off as offset or recoupment, or whatever technical name you want to put on it, and if the offset amounts to the amount of the claim, or is equal to the amount claimed of the royalties, then there is no recovery on the original complaint.

If it is less then the recovery would be the difference between the amount of the damages sustained and the amount due under the contract in the form of royalties. And as to the cross-claim, the same proposition, as I see it, will be involved. That is to say, if this Benedict sustained damages what is the amount of the damages. If they sustained more damages than they owe the complainants then it will be entitled to a recovery.

Mr. Kramer: On the crossclaim?

The Court: That's right.

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Mr. Kramer: In other words, the amount, if I am improper be free to stop me, but as I get it the amount of the original claim, if there is damage shown for which these people were responsible, the International and the District, that there would be an offset?

The Court: And these members of this local union. I am going to charge that this is for the benefit of
9 this local union and if they violated a contract and caused damage to Benedict, then they will take that into consideration.

Mr. Kramer: As against the Trustees?

The Court: Right. That is in accord with my holding. And I have held that which has been paid is gone. That is a part of an executed contract. We will hear no proof on that because that cannot be recovered back.

(Whereupon, counsel presented argument to the Court.)

The Court: I do not plan to submit any separate issues. I expect to charge the jury generally about these matters. I expect to charge the jury generally on two propositions. First, the claim that there is a breach of a written contract as amended. They will have to pass on that after hearing all the proof.

Second, there is a statutory breach, or claimed statutory breach of a contract involved in this boycott.

Mr. Kramer: On the alleged strikes?

The Court: Yes. I am going to cover those propositions generally and let the jury pass on it. If they get to the question of damages I am going to charge them in the usual way about the alleged damages.

Mr. Kramer: I assume it would be then this way:
10 That if they don't show that on a particular strike, then the jury should disregard that, and if there is evidence on the others they should consider that.

The Court: Right.

(Whereupon, counsel presented argument.)

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The Court: I am going to charge the jury to the effect that if these employees breached this contract in that they failed to follow the administrative procedures set out in the contract by striking and that strike caused this Benedict Coal Corporation \$100.00 damages, and if the Benedict Coal Corporation owes these Trustees \$200.00 from these royalties, then they should deduct \$100.00 from the \$200.00 and leave \$100.00 balance.

Mr. Milligan: Of course, our position is, if your Honor please, and will continue to be, that if the contract is breached by the Union, any one of the three, that when a contract is breached it constitutes a breach pro tanto—it is breached in toto, and consequently they cannot recover anything.

The Court: Is it your position that if it was breached by a strike of one day and that caused you damages in the amount of \$8,000.00 that you don't owe any amount?

Mr. Milligan: It is our position if they breached
11 the contract they cannot recover on a contract which they have breached. The question of whether it was breached would be a matter to be determined by the jury under your Honor's instructions.

The Court: Well, then you are saying to me now, as I understand it—

Mr. Milligan: I mean a material breach. I don't mean some little insignificant technical breach, but it is a matter the jury will pass on under your Honor's instructions.

Mr. Kramer: I understand the position you are taking now then is this, that if there was any material breach, it makes no difference how much damage you might be able to prove—you did not prove but \$50.00, you want the jury to determine whether that is a material breach and if it is a material breach they would not recover anything?

That would not prove anything under the cross-action, because they have not proven damages. Is that clear?

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Mr. Milligan: No.

The Court: Mr. Winston, what do you say on that? Do you say if there was a material breach of this contract and that your company was caused damages to the extent of \$100.00, that your company is out on the original claim?

Mr. Winston: No, sir, that would not be material. I mean, I think the amount of damages could be considered as determining whether or not it is a material breach. Material is something that goes to the gist of the contract, or if it is sufficient to put the company in such a financial condition they cannot pay, I think that is material. To suffer \$100.00 damages, I think that is not material.

The Court: I am going to put that to the jury, let the jury decide whether or not there is any breach; second, if so did that breach put Benedict in the position where they could not pay. I am going to talk to them along that line.

Mr. Milligan: That is the theory I had in mind.

(Whereupon, counsel presented argument to the Court.)

(Whereupon, the jury returned to the court room and the following proceedings were had in the presence of the jury, to-wit:)

(Whereupon, counsel for the respective parties made an opening statement to the jury.)

The Court: Adjourn Court until 2:00 o'clock p. m.

(Whereupon, at 12:30 p. m. Court recessed until 2:00 p. m.)

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Afternoon Session.

(Whereupon, at 2:03 p. m. Court reconvened and the following proceedings were had in the presence of the jury, to-wit:)

The Court: All right, gentlemen.

Mr. Kramer: May it please the Court, we desire to read a stipulation to the jury.

The Court: All right, sir. Will that be Exhibit No. 1, Mr. Kramer?

Mr. Kramer: It will be; but before I read that stipulation I should read an averment contained in the original bill of complaint, and I am reading from Section 4 of the Bill of Complaint that:

"Between the 5th day of March, 1950, and the 31st day of July, 1953, the defendant was engaged in the business of operating certain coal mines at St. Charles, Virginia. On March 5, 1950, the Virginia Coal Operators Association, of which the defendant was a member, entered into the National Bituminous Coal Wage Agreement of 1950 (a copy of which is attached hereto as Exhibit 'A' and made a part hereof by reference)"—I am not going to read it at this time—"effective the 5th day of March, 1950, under the terms of which the defendant was required to

pay into the United Mine Workers of America welfare and Retirement Fund the sum of thirty cents

(30¢) per ton for each ton of coal produced for use or sale. On the 18th day of January, 1951, the Virginia Coal Operators Association signed the Amendment to the National Bituminous Coal Wage Agreement of 1950, effective February 1, 1951. On the 29th day of September, 1952, the Virginia Coal Operators Association signed the Amendment to the National Bituminous Coal Wage Agreement of 1950, effective October 1, 1952 (a copy of which is attached hereto as Exhibit 'B' and made a part hereof by reference)"—I am not taking time to read it—"under the terms of which the defendant was required to pay into the United Mine Workers of America Welfare and Retirement Fund the sum of forty cents (40¢) per ton for each ton of coal produced for use or sale. On December 23, 1952, the defendant signed the National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952 (a copy of which is attached hereto as Exhibit 'C' and made

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a part hereof by reference) effective October 1, 1952, under the terms of which the defendant agreed to pay unto the United Mine Workers of America Welfare and Retirement Fund the sum of forty cents (40¢) per ton for each ton of coal produced for use or sale."

15 In the answer filed by the defendant coal corporation, the averments contained in that paragraph of the original bill are admitted.

Based upon that, may it please the Court and lady and gentlemen of the jury, this stipulation has been entered into.

"In this action, we stipulate as to the following facts:

"1. Payments of royalties were made by Benedict Coal Corporation to the United Mine Workers of America Welfare and Retirement Fund during the period of from and including March, 1950, through and including July, 1953, on the dates, in the amounts, and for the period of operations as shown in the affidavit of Thomas F. Ryan, Jr., on file in this action. A copy of said affidavit is attached hereto and by this reference is made a part hereof"—at this time I do not read that.

"2. Coal was mined by Benedict Coal Corporation during the period stated in paragraph 1 thereof in the number of tons shown on a month-to-month basis by Exhibit 'I' to the deposition of Guy B. Darst taken in this action by the plaintiffs for discovery. A copy of said exhibit is attached hereto and by this reference is made a part hereof."—I do not read either of those at this time.

16 "3. The amount of coal mined by Benedict Coal Corporation during the period of from and including March 5, 1950, through and including September 30, 1952, was—467,158.8 tons.

"The amount of royalty thereon calculated at \$0.30 per ton is—\$140,147.64.

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“The amount of royalty paid to the United Mine Workers of America Welfare and Retirement Fund by Benedict Coal Corporation applicable to the coal mined by it during said period was—\$78,968.16.

“4. The amount of coal mined by Benedict Coal Corporation during the period of from and including October 1, 1952, through and including July, 1953, was—94,038.2 tons.

“The amount of royalty thereon calculated at \$0.40 per ton is—\$37,615.28.

“The amount of royalty paid to the United Mine Workers of America Welfare and Retirement Fund by Benedict Coal Corporation applicable to the coal mined by it during said period was—\$22,290.52.”

And the stipulation is signed by counsel.

And then we further stipulate that the amount of such royalty for both periods which was not paid is \$76,504.21.

This stipulation is filed as Exhibit No. 1, your Honor.
17 (Exhibit No. 1 was filed.)

Mr. Kramer: The original complainants rest, your Honor.

Mr. Winston: Your Honor, in the interest of getting along faster, I want to make this statement to the Court.

In our pleadings we have alleged damages from a strike on March 6, 1950, and studying over the case there is a question in our mind—there was a stoppage then but a question in our mind as to whether that was a breach of contract. We are therefore deciding not to rely on that for damages and we will not go—

The Court: The March 6, 1950, strike is out of that.

Mr. Winston: As far as we are concerned for damages, yes, sir.

Mr. Kramer: I don't understand, may it please the Court, the statement of counsel, out for damages. I understand it is out for all purposes.

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Mr. Winston: I expect that would be so, sir.

Mr. Kramer: So accepted, your Honor.

The Court: All right.

Mr. Winston: Now, sir, we also allege in our pleadings a strike on January 30, 1953. It is our position that was a breach of contract but because of the work situation at that time, our research has shown that it was not damaging.

18 The Court: All right.

Mr. Winston: Therefore, we withdraw the claim for damages. That was of one day.

Mr. Kramer: I understand then it is out of the case for all purposes?

Mr. Winston: Yes.

The Court: The March 6, 1950 date of the strike is out of the case, lady and gentlemen, for all purposes, and the alleged strike on January 30, 1953 is likewise out of this case for all purposes.

I think it would help the jury if you would take your crayon and mark off of the map, Mr. Winston.

Mr. Kramer: Your Honor, there are other spots on that chart that are not averred in the pleadings and which when any effort is made to introduce it the chart will be objected to. If they are going to eliminate part, any other not covered by the pleadings should also go out.

Mr. Winston: Your Honor, I think I stated in my opening statement certain of these strikes were damaging and certain others because of the work situation were not, yet they were strikes and breaches of contract. I think to show the general pattern and what went on there, that it is considered in evidence but not as to ascertainment of damages.

19 The Court: All right. Plaintiff has rested. Are you ready to go forward with your evidence?

Mr. Winston: Yes, sir.

GUY B. DARST,

called as a witness by and on behalf of the defendant-cross plaintiff, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Winston.

Q. Your name is Mr. Guy B. Darst?

A. That is correct.

Q. What is your position with the Benedict Coal Corporation?

A. General manager.

Q. Where do you live, sir?

A. I live at Harlan, Kentucky, and commute back and forth between St. Charles and Harlan, a distance of about 25 miles.

Q. Where did you formerly live?

A. At St. Charles.

Q. Where were you raised?

A. Raised in Knoxville, Tennessee.

Q. How long have you been connected with the Benedict Coal Corporation?

20 A. Since 1946.

Q. Who is the president of the Benedict Coal Corporation?

A. My father, Mr. Guy Darst.

Q. During the period of this controversy who was in active charge or on the job at the Benedict Coal Corporation?

A. I was. I was the only job management.

Q. And where is the operation located, sir, the Benedict Coal Corporation?

A. About three miles north of St. Charles, Virginia; nine miles north of Pennington Gap, in Lee County of Virginia.

Q. Was the Benedict Coal Corporation operating under a contract with the United Mine Workers of America?

A. It was.

Q. Was the Benedict Coal Corporation the member of any association there in Virginia?

A. It was a member of the Virginia Coal Operators Association with headquarters at Norton. At the beginning of this litigation it was. During the period of time it dropped out of the Virginia Coal Operators Association to save the 2¢ a ton that it cost to belong.

Q. Now, sir, did the Virginia Coal Operators Association enter into a contract with the United Mine Workers of America in 1950?

21 A. They did.

Mr. Winston: Your Honor, the 1950 contract has been filed in evidence as part of the pleadings. I have been furnished with another copy of it and I would like to introduce this.

The Court: That is Exhibit No. 2.

Mr. Kramer: Yes.

The Court: In introducing all of these exhibits to the pleadings, either side that wants them in the record, we will number them numerically without paying any attention to what they were in the pleadings.

(Exhibit No. 2 was filed.)

By Mr. Winston:

Q. How long did the Benedict Coal Corporation operate under the contract of March 5, 1950?

A. Until it was amended and renewed, I believe in late September, 1952.

Q. I will hand you a copy of the National Bituminous Coal Wage Agreement of 1950 as Amended and ask you if that is your signature, sir?

A. It is.

Q. And I believe it is signed by the Union. By whom is it signed?

A. John L. Lewis, Allen Condra and E. L. Scroggs.

Testimony of Guy B. Darst

Q. What position did Mr. Lewis have with the union?

22 A. He was president of the International Union.

Q. What position did Mr. Allen Condra have with the union?

A. He was president of the District, District No. 28.

Q. What position did Mr. Scroggs have with the union?

A. I think at that time he was secretary-treasurer.

Q. Of which?

A. Of District 28.

Mr. Winston: We offer this as Exhibit No. 3.

(Exhibit No. 3 was filed.)

The Court: If you want any of these shown to the jury, we will have the Marshal pass them.

Mr. Winston: I was going to read them to the jury.

The Court: All right. You may do so.

By Mr. Winston:

Q. Now in March of 1950 after the 1950 contract was signed, sir, how big an operation did Benedict have at St. Charles?

A. Benedict was operating at that time four coal mines. It had always been customary to run coal from two mines keeping them separate, keeping the coal separate and loading them separately in one preparation plant, and at that time Benedict was engaged in transferring from two nearly worked out seams of coal into two new seams which were being developed.

22 Q. How were your seams numbered?

A. The seams in that part of the country were numbered from the bottom to the top. On the Benedict property they are numbered from No. 5 to No. 12, going up in altitude.

Q. In which seams were you working when you entered into the 1950 contract, March 5th?

A. We were working the No. 11 seam which was about

Testimony of Guy B. Darst

to be worked out, and the No. 7 seam also being worked out, and from those two seams we were moving into the No. 9 seam from No. 11 and the No. 10 seam from No. 7.

Q. Were you opening up new openings in those latter seams?

A. That is correct.

Q. When you moved from the nearly worked out seams into the new seams, what effect did that have on your personnel?

A. The whole idea was to transfer the men and equipment from the worked out seams into the new seams; however, the seams working out were working out faster than they should have been and planned, and it was necessary to lay off some of these employees since we did not have work room for them in the new seams.

Q. In the new seams?

A. Yes.

24 Q. And the new seams were those two operations that you were commencing?

A. Yes. They were solid acreages of coal.

Q. When you were making that transition from the old seams to the new seams, did any difficulty arise with the company and the men?

A. Yes.

Q. Tell the Court and jury what happened, sir.

A. Well, the No. 7 seam worked out faster than was ideal, could not furnish work places to all of those men in No. 7, and 40 or 50 men had to be cut off when certain sections of the mines worked out and those men claimed jobs in the other two seams of coal.

Q. Did you have any dispute over that with the men?

A. We did. We had a strike on April 14 and April 17, which are, respectively, Friday and Monday.

Q. Now, sir, did you have any forewarning of that strike?

A. No.

Testimony of Guy B. Darst

By the Court:

Q. April, what date is that?

A. April 14 and April 17.

By Mr. Winston:

Q. And what year?

A. Of 1950.

25 Q. I believe that is marked on your—

Mr. Kramer: I object to any reference to that. That has not been introduced. When offered I want an opportunity to be heard.

The Court: You may refer to that map for convenience only. The objection is overruled.

Mr. Kramer: Your Honor, then I ask the map be corrected so as not to include in the red lines any date not included in the pleadings and the lawsuit. If that is done then, of course, I have no objection.

The Court: Why isn't that—why do you want the markings or dates that are not included in the lawsuit, Mr. Winston?

Mr. Winston: Well, your Honor, there were certain strikes during times that were not damaging, that is, short work periods. We put that on to show the breach of contract and the pattern used in the strikes.

Mr. Kramer: If we are going to argue that I want it to be out of the presence of the jury, and I want to state our grounds.

The Court: Objection is overruled. Go ahead.

By Mr. Winston:

Q. Now, sir, in which mines were those strikes?

A. Well, all the mines were affected on the dates of the strike. Notice had been given that we were going
26 to have to cut off some of the men because of the places being worked out and several days before the actual cut-off. I don't believe I have answered your question completely. Can you repeat it?

Q. I believe that is all right, sir.

Testimony of Guy B. Darst

A. All right.

Q. Now what did you do, sir, after the men struck?

A. Well, Benedict was transferring from two worked out seams into two new seams. A very expensive proposition. The Benedict was anxious to continue working. We called, I believe, for the field worker to come down and ask the men to go back to work and to arbitrate the dispute on the placement of the laid-off men.

The laid-off men, some of them, I might explain the reason for the dispute, were older from the point of service with the company and were claiming jobs in another different mine to replace younger men.

Q. Did you have any meeting with any member or officials of the union?

A. Yes. We called the committees and Mr. Scroggs to come down, and had a meeting, I believe on Saturday, the 15th.

By the Court:

Q. Called whom? What is the man's name?

A. Mr. Lloyd Scroggs, who was the field worker for District 28.

27 Q. How do you spell that?

A. S-e-r-o-g-g-s.

By Mr. Winston:

Q. What was Mr. Scroggs' position when he came down?

A. Mr. Scroggs maintained that the company should place the oldest man up regardless of the fact that the company was operating separate coal mines and had separate mine committees for each mine, regardless of the fact that placing up men from a hand-loaded mine into a mechanized mine would very much hamper the efficiency of the coal mine.

By the Court:

Q. What did you say Mr. Scroggs' position was?

A. That the company should place—

Testimony of Guy B. Darst

Q. No. I mean what is his status?

A. He was a representative of the District, the field worker.

Q. District No. 28?

A. District representative, District 28.

The Court: All right.

By Mr. Winston:

Q. What was the company's position in regard to this dispute for the settlement of it?

A. The company's position was that the organization of the other two coal mines would be very much disrupted by the placement of the No. 7 men who were laid off, and that the No. 11 and the No. 9 mines were separate coal mines from the No. 7 regardless of the fact that they were loaded through the same tippie which kept the grades and kinds of coal separate.

Q. How did the company want to settle this difference?

A. The company was willing to place up a few of the men whose jobs were similar to the job in the other seam and would go no further than that.

Q. Was there anything stated by either party as to arbitrating that difference?

A. Oh, yes. When we had the meeting we asked Mr. Scroggs to get the men back to work and let's arbitrate, to arbitrate the various grievances of the various men.

Q. Did Mr. Scroggs agree to that?

A. No, he did not.

Q. What was his position?

A. Place the men according to their seniority and jobs regardless.

Q. Did he attempt to get the men to go back to work before you had any settlement of that difference?

A. No.

Q. How was the strike finally settled?

A. If I recall we sat from about noon time on Saturday

Testimony of Guy B. Darst

until after dark arguing the matter out, and finally the company caved in and tried to place up the men as
29 nearly as possible to not hamper the efficiency of the mine, or to hamper the efficiency of the mine the least, and to give no more ground than necessary to get the mine back to work.

Q. Were any of the local committees in on that conferences?

A. Yes. We had the committee from the No. 11, No. 10, No. 9 and No. 7 mines in the office. The mine committee is generally composed of three men for any given mine.

Q. Now, sir, what is the number of the local, that is, that was then located in Benedict, if you remember?

A. 6372, I believe, and it would be on that contract that you have already put into evidence.

Q. That local comprises workers of your operation. Is that your whole operation?

A. As far as I know the Benedict Coal Corporation only.

Q. Now, sir, after that strike to your knowledge did Mr. Scroggs or anyone else in the District take any disciplinary steps toward the local members to discourage or prevent that stoppage?

A. No, sir.

Q. Now, sir, coming through 1950 until the month of September, did you have any labor difficulties at that time?

A. Yes, we did.

Q. What happened at that time, sir?

30 A. 1950 was a particularly dry year. The camp water supply was from a reservoir from a worked out section of the No. 10 seam. The water kept getting lower and lower and finally ran out.

Before it ran out we tried to conserve it by cutting the water off into the camp at night. We had two or three squabbles over it before the September strike.

Testimony of Guy B. Darst

The men living outside the camp bathed in the camp. We cut them off from bathing in the camp after a one day strike, I believe, in August, and finally the water ran out, and the men struck because the water ran out. The first time in the history of Benedict it had run out.

Q. How was that strike resolved?

A. At that time the company was doing all in its power to tap new sources of water. We had purchased and were trying to get laid up some three or four thousand feet of pipe to another source of water, and finally when the men saw we meant business and were trying to get water to them in the camp they went back to work.

Q. Did the company take any steps as to these men, about these men that worked at Benedict but lived outside the camp?

A. Yes. We stopped them from bathing in the camp, within the camp proper, when the inhabitants of the camp began to complain about it.

31 Q. And was that before the strike?

A. That was before the strike.

Q. Did you have any forewarning that strike was coming?

A. No, except that there were grumblings around for a few days beforehand.

Q. Did you have any meetings with the committee or anyone before that strike or during the strike?

A. No. There wasn't any reason for them to strike and we could not foresee that they would strike.

Q. Well, were you willing to have met with the committee had they come to see you about the water situation?

A. Of course, yes, always.

Q. Now, sir, coming to January 10th and 11th of 1951. Can you tell the Court and jury whether you had any troubles at that time?

A. Yes, sir, we did.

Q. What was the trouble then, sir?

Testimony of Guy B. Darst

A. The trouble there was over a foreman in the No. 5 seam, which was being opened up after we were finally forced to close down the upper seams on top of the mountain, which were still working, incidentally, in January of 1951, because the foreman asked the men to put out more work and probably used some profanity. His name was

32 Jim Collingsworth and he was asking the men to put out and they struck to try to get the foreman discharged.

Q. Did you have any forewarning of that strike, sir?

A. No, there was no forewarning.

Q. What happened after they struck, after the men struck?

A. Well, we called—the first thing the company always did was call the District to try to get some discipline and get the men back to work so that the matter could be arbitrated under the contract.

We called Mr. Scroggs to come down again and see if he could get the matter settled.

Q. Was the company willing and wanting to arbitrate that dispute?

A. Of course.

Q. What was the union's position about it?

A. Well, the union always upheld the men. Mr. Scroggs upheld the men and that Mr. Collingsworth was not a fit foreman and should be replaced.

Q. How did that strike resolve itself?

A. At that time we could tell we could not keep operating on top of the mountain which is several miles from the preparation plant and we were gradually developing the No. 5 seam preparatory to coming down to the No. 5 seam, which is right at the tippie, with the idea of reducing our costs to where we could operate and live.

33 Q. Did the men go back to work?

A. I did not finish answering that question.

Q. Excuse me, sir.

Testimony of Guy B. Darst

A. We pointed that out to them and that sooner or later Mr. Collingsworth would be under other supervision, and they went back to work.

Q. Was Mr. Collingsworth fired?

A. No, he was not fired.

Q. Now, sir, you have spoken of Mr. Seroggs coming down. Just a few questions about him.

What was his position with the union at that time?

A. District representative or field representative.

Q. What were his duties in regard to the disputes that came up between the workers and the company?

A. Well, under the contract when there is a grievance—

Mr. Kramer: We object to the witness testifying what is in the contract. It is a written instrument and speaks for itself.

The Court: Well, that is correct. That is correct but he can give his idea about the contract subject to the objection of counsel. The contract is what is binding, gentlemen.

By Mr. Winston:

Q. Go ahead, sir.

A. I don't think he will object to what I am going
34 to say. Under the contract the field representative comes into the case after the management has discussed the dispute or grievance locally with the local committee. That is the third or fourth step.

Q. Is that part of his duties under the contract?

A. That is part of his duties under the contract. When we would have a strike it was then too late to go through the steps in the contract and we always hollered for the field worker in an effort to get him to tell the men to go back to work and arbitrate.

Q. Now, sir, could you explain, just before we go further, the make-up and the purpose of the mine committee that you have spoken of?

A. The mine committee is composed of three members, ordinarily, who work in the mines and whose job it is if the individual worker has a dispute to try to iron it out with his foreman or the mine superintendent.

Then the committee takes it up with the mine management, which means it is a full-dress meeting. That is their job and responsibility. They are a committee that is set out in the contract to handle grievances.

Q. And who was on that committee at the time, sir?

A. That is now the January 10th and 11th strikes?

Q. Yes.

A. I believe Ray Hargraves was on the committee, 35 and another fellow named Cecil Fortner. I don't recall the third one offhand.

Q. After that meeting that you had during the Collingsworth strike did you hear Mr. Scroggs—I mean you, yourself—hear Mr. Scroggs tell the men anything, that is, what you heard yourself or what you may have heard yourself?

A. I didn't hear it myself but it came back to be firsthand.

Q. Don't state what you heard, sir.

A. All right.

Q. But you did get certain information?

A. Certain information, yes.

Q. Did the company wish to arbitrate that dispute and keep the men working?

A. Yes. Always, every time.

Q. What was the position of the union?

A. The union always took the side of the men, whether it was right or wrong.

The Court: Now, what disputes are we talking about?

Mr. Winston: The Collingsworth.

The Court: Collingsworth.

The Witness: The Collingsworth strike. The union upheld the men in the Collingsworth strike.

Mr. Kramer: I do not know what he means by the

union, whether he means the local or district
36 representative.

The Court: The objection is good. You have to be specific, gentlemen.

By the Court:

Q. What time in January? I understood from you, Mr. Darst, you were talking about January 10 and you said trouble arose.

A. January 10th and 11th.

Q. January 10th and 11th?

A. Yes, sir.

Q. 1951?

A. Yes, sir.

Q. A strike?

A. Yes, sir.

Q. All right, was that over Collingsworth?

A. Over Collingsworth.

The Court: Go ahead.

By Mr. Winston:

Q. Did that dispute go to arbitration?

A. No, it did not.

Q. Now, sir, coming to July, 1951. Did you have any strike at that time?

A. We did.

The Court: You are going to give a definite date?

Q. Do you recall the date of that strike?

37 A. The last two days, July 30th and 31st.

Q. How did that strike come about, sir?

A. During all the striking in 1950 and 1949, outside of the period of this litigation, when we were on a three-day work week—

Mr. Kramer: I object to that.

The Court: Sustained. That is not competent, gentlemen, for any purpose. Only the period of time that is involved in this litigation.

The Witness: Ask your question again.

By Mr. Winston:

Q. How did this strike come about?

Mr. Kramer: Talking about the strike of July 30 and 31st?

Mr. Winston: That is correct, of 1951.

A. Between January and July the No. 5 mine was developed far enough to close down the expensive operation on top of the mountain. The closing down of those mines caused a cut off of quite a number of men. Those men had been carried and had been granted credit by the company, and they were due vacation pay up through the time of their cut-off at the vacation time in July.

Vacation pay is paid the last regular pay day in June before the vacation, which at the time was a ten-day period around the Fourth of July.

38 The company endeavored to collect some of the monies that was owed by these individuals from the vacation pay, not necessarily collect all of the vacation pay but enough of it to regain some of the money that was extended to these men on credit. It did not involve too many men.

Several of them, or a lot of them, got their whole vacation pay that were not in debt to the company. And we wrangled about that all through July until finally on the 30th and 31st the men struck and demanded all of their vacation pay in full for the men whose vacation pay had been withheld or a portion of it withheld.

Q. Now right there, sir, were the men who struck the same men that had their vacation pay withheld?

A. No. The men who struck were men who were still working. The men whose vacation pay had been withheld, or partially withheld, were in the cut-off, or in the lay-off of the closing down on the upper seams.

Q. Did you have any forewarning of that strike?

A. We tried to settle the matter in two or three meet-

ings during July during which time Mr. Seroggs was there as the field representative, but we had no luck.

Q. What was Mr. Seroggs' position?

A. Mr. Seroggs' position was that we owed those men that vacation pay, no matter how much those individual men owed to the company.

39 Q. What was the company's position about arbitrating that matter?

A. Well, the company position was that it should be allowed to collect whatever could be collected that the individual was entitled to and willing to pay us.

Q. Was there anything stated about arbitration of that dispute?

A. I believe so. We——

Mr. Kramer: What was the answer?

A. I believe so, yes. We asked for arbitration of that.

Q. What did Mr. Seroggs say as to that?

A. Mr. Seroggs said these men are due all of their vacation pay in cash, and he also said after one of the meetings was over, within my hearing, "Boys, it looks like you are going to have to take this matter into your hands."

Q. Who was he talking to at that time?

A. He was talking to the committee.

Q. What happened after that statement was made at your mines?

A. We had the strike. I believe the meeting was the Saturday preceding the Monday and Tuesday which are the 30th and 31st.

Q. Was that matter arbitrated, that strike arbitrated?

A. No.

40 Q. Did Mr. Seroggs at that time make any statement about whether or not it was a matter for arbitration?

A. Yes, he did. I believe he said that "This isn't a matter for arbitration. We won't arbitrate it."

Q. How was that strike settled?

A. I don't know just who thought of this plan but this is what happened. We asked each individual from whom all or portion of the vacation pay had been withheld to come in and talk individually with the bookkeepers, who are also what you might call credit managers, to see if they would give us a proportion of their vacation pay voluntarily to apply against their account owing the company.

That was done. We collected some monies that way, and divided with the men and they voted to go back to work.

Q. Was that after the strike had been called, or was it after the strike was in effect?

A. Yes. During those two days that was what occurred.

Q. Was the mine down during that time?

A. Yes.

Q. Now coming to October of 1951, did you have any trouble at that time?

A. We did.

Q. During what period of time, sir?

A. We had a strike from October 1st through October 8th.

41 Q. What was that strike over, sir?

A. That was over credit to the cut-off employees. The company had been extending credit to a portion of the men who had been laid off from the end of February, 1951, up to October, 1951, and the company had run its string out on extending credit to its men.

Those were men earmarked to go into the No. 5 coal mine when the mine had developed to the point we could put them to work.

We simply told them we could no longer carry them for the \$3.00 per day per man we were giving them, and the men, the men in the mines still working, struck.

Q. Were the men who struck the same men you had cut their credit off?

A. No, they were not.

Q. How long did that strike last, sir?

A. The strike lasted from the afternoon of October 1st through October 8th.

Q. Did you have any forewarning that strike was going to happen?

A. No, we did not. We simply asked the union, the local union, to carry those men and advance them money since the company could no longer stand the amount that was being required to keep them alive.

Q. Now after you had the strike did you meet with
42 any of the officials of District 28, or representatives?

A. Yes. During that week, during that week we had two or three meetings with them.

Q. Who did you meet with?

A. We met with the mine committee first and tried to work the thing out and tried to get them to arbitrate it.

Q. What was their position about arbitrating?

A. Their position about arbitrating was "No, you put these men to work or you continue"—correction, Mr. Reporter.

"You continue to keep these men on credit and we will go back to work." And after that we called in Mr. Seroggs again and had another meeting, and his attitude was: Extend these men credit and we will go back to work.

Q. What did he say?

A. Just about that. If you go ahead and extend these men credit the men will go back to work in the mines.

Q. Did he say anything about the strike being called off?

Mr. Kramer: I object to that as leading, your Honor.

The Court: Yes, it is a little leading.

By Mr. Winston:

Q. Now, sir, was that matter arbitrated?

A. No, it was not arbitrated.

43 Q. How was the strike settled?

A. In one of the meetings, one of the final meetings, the local union who had some funds of their own agreed to guarantee credit to the men who were waiting to be put to work and who were moving away and leaving from time to time; they guaranteed to the company, and with that we begin to give them credit again and they went back to work with the local union guaranteeing the credit.

Q. What happened to that guarantee that the local gave?

Mr. Kramer: We object to that, your Honor. That has nothing to do with the strike.

The Court: What is your position about that, Mr. Winston?

Mr. Winston: Well, it shows the general way they treated them.

Mr. Kramer: It is not a party to this lawsuit.

The Court: Overruled. Yes, the local union is very much involved in the lawsuit, Mr. Kramer, the way the Court has held.

Mr. Kramer: But my remark was, your Honor, not involved, I meant to say not a party to the suit.

The Court: Not a party but very much involved. Go ahead, you may answer.

The Witness: Repeat the question, please.

44 . (The pending question was read by the reporter.)

The Court: Do you propose to show that relates to any alleged strike with the happening of the guarantee? If not, it is not competent, Mr. Winston, but if it has some relation to some work stoppage and it shows a part of the whole picture, then it is competent.

Mr. Kramer: Your Honor, the matter was gone into in pre-trial and no effort made to show any relationship to any work stoppage.

Testimony of Guy B. Darst

The Court: I sustain the objection unless counsel states to me he expects to connect it up with some alleged work stoppage. If it is not connected up it would not be competent, the jury should not hear it.

Mr. Winston: It did not connect with any subsequent strike, as I recollect.

The Court: I sustain the objection at this time.

Mr. Winston: But it was a consideration for the calling off of this strike.

Mr. Kramer: You have already proven the statement made by the local was for consideration of the stopping of the strike. To that extent I did not object, your Honor.

The Court: I have permitted you to show that.

Mr. Kramer: That is already in the record.

45 Mr. Winston: All right, sir. We save exception.

The Court: All right.

Were there any subsequent guarantees in here of a local union, any subsequent guarantees after this?

Mr. Winston: I don't recall any, sir.

The Court: If there were not it would not be competent. If there were subsequent guarantees it might be competent. I have to know about that.

Mr. Winston: I don't recall any, sir.

Mr. Kramer: None were proven in the pre-trial investigation. That is all I can say.

The Court: I do not see any basis for its competency at this time, in the light of what you gentlemen say.

Mr. Kramer: Of course, I am relying on the pre-trial.
By Mr. Winston:

Q. Now, sir, coming to November, 1951. Did you have any trouble at that time?

A. Yes, we did. We had two separate one day strikes.

Q. What were they over, sir?

A. They were over the company trying to enforce a little bit of discipline. We had an employee who was a chronic absentee.

Testimony of Guy B. Darst

Q. Just first point out the dates of those strikes.

46 A. November 2nd and November 7th.

Q. Go ahead, sir. What was that over, sir?

A. And we discharged this man for chronic absenteeism. He was absent at least one-third of the time. His job was, I believe, coupler on a locomotive crew on the main line tram, and at least two days a week he was off—every Monday morning and generally one more day in the week.

Q. What was the man's name?

A. Ernest Taber.

Q. What happened after you discharged him?

A. They struck one day and then Ernest Taber thought he had a job at another mine close by——

Mr. Kramer: Of course, your Honor, I object and move to strike that. This witness does not know the thoughts of somebody else.

The Court: No.

By Mr. Winston:

Q. What did you know about his obtaining other employment?

A. The management of the other mine told us——

Mr. Kramer: That is the reason I objected to it.

The Court: That is sustained. That would be hearsay evidence.

The Witness: If they told it to me?

The Court: The manager of another mine?

47 The Witness: Yes.

The Court: That would be self-serving and hearsay, too. Two reasons why that would not be competent.

By Mr. Winston:

Q. Do you know whether he obtained any employment at the other mine?

A. He did not.

Q. Then what happened?

A. They struck another day.

Testimony of Guy B. Darst

Q. And what was the reason for their striking at your mine?

A. They wanted that man taken back to work, and I believe, Mr.—I can't remember his initials—Mr. Clark, who was then beginning to replace Mr. Scroggs, came down with the mine committee and practically on bended knee made the company take that man back to work.

Q. What was his position or what did he say?

A. "Take this man back to work. He has got a family and he needs to work. We guarantee that he won't miss any more working days."

So the company took him back to work of course, and caved in again, give in to the union so they could get back to work, and the company needed to work in this season of the year.

Q. Well, was any attempt made to settle that
48 through the——

A. We asked them to arbitrate it.

Q. And would they do that, sir?

A. No.

Q. Did they do that, sir?

A. No, they did not.

Q. Did you have a strike on August 5th and 6th, 1952?

A. Yes, we did.

Q. What was that strike over?

A. That was over the discharging of two men who carelessly applied the power to a locomotive hooked several mine cars without anybody being on the locomotive before checking it to see if the controller was taken off, and when they applied the power at the end of a cable a short way from the locomotive the locomotive started up by itself untended and plunged off a 20 or 30 foot embankment into the creek and took several mine cars along with it, and those men were discharged for their negligence.

Q. What happened after those men were discharged?

Testimony of Guy B. Darst

A. That occurred on Monday, the 4th of August, the negligent act on the part of these two men. On the 5th of August everybody was on strike because of this discharge.

Q. Well, sir, did anybody from the District come down during that strike?

A. Yes. Mr. Clark, I believe, came down. I called
49. Mr. Scroggs, who was then I believe the secretary-treasurer, and asked him to get something done about it, to make the men go back to work and let the company arbitrate the dispute.

Q. What did Mr. Scroggs say?

The Court: Mr. Clark.

Q. Correction, what did Mr. Clark say?

A. I didn't call Mr. Clark. What I started to say, Mr. Scroggs got in touch with Mr. Clark and sent him on down.

Q. When Mr. Clark came on down what did he say?

A. Well, the committee had taken this case up, called the strike, and Mr. Clark's position was: You have to give these men back their job. You got no right to fire them.

Q. Would he agree to let them go back to work?

Mr. Kramer: Don't state any conclusion.

Q. Did he agree to arbitrate it?

A. No, sir, he did not.

Q. What did the company do? How did you resolve the strike?

A. The company caved in again and agreed to put the men on some other work, transfer them off the job they were on to another job that did not involve machinery.

In fact, we made a job for them to put them back to work so that the mine could go back to work.

Q. What was the value of that piece of machinery
50 that they allowed to go into the creek?

A. Several thousand dollars. Four or five thousand dollars.

Q. How much loss was involved to the company?

A. Well, the use of that machinery for a couple or three days, a day or two, also put them just short one electric locomotive which hurt the company, and then the expense of getting the locomotive and the cars out of the creek. I would say efficiency was hurt, 10 to 15 percent.

Mr. Kramer: I object to him measuring what the efficiency was hurt.

The Court: Overruled, that goes into the picture, the whole picture. That is not a matter of damages, but I will let the jury consider that to see the attitude of all parties in this controversy. Go ahead, you may answer.

By Mr. Winston:

Q. Was that all your answer?

A. Yes, from the time we had to do without this equipment.

The Court: That is not a matter you will consider as damages. You are not suing for that item of damages in this case, are you, Mr. Winston?

Mr. Winston: No, sir.

The Court: You may look to that as well as all
51 the other evidence to see what the whole picture of this situation is that is under discussion.

By Mr. Winston:

Q. Coming to October of 1952, did you have any work stoppage at that time, sir?

A. Yes, we did.

Q. Do you have the dates?

A. Yes. That strike was from October 16, I believe, through the 28th, for nine days, whatever those dates are, 16th to the 28th.

Q. What happened at that time, sir?

A. A new contract had been signed in December granting the mine workers \$1.90 a day increase in wages, which I think raised their wages to \$18.45 a day. The Wage Stabilization Board would not allow but \$1.50 of those wages—

Testimony of Guy B. Darst

Q. Let me ask you one question, sir——

Mr. Kramer: Let him answer.

Mr. Winston: Excuse me: I didn't mean to cut you off.

A. (Continuing) I was not quite through answering. And the company was obeying the government directive not to pay them more than a dollar and a half and holding the forty cents in account for the men to be paid after the Wage Stabilization Board approved it.

We did not have any inkling there would be a strike
52 but there was, and after the strike started we offered to pay the men that 40¢ additional in order to go on back to work since there were other coal mines who were doing that, and go ahead and work during that time. Particularly in Harlan County, several mines worked. Harlan, Wallins Corporation, worked right through that period.

I called Mr. Seroggs and asked him, in fact, I called for Mr. Condra first after the first day or so of the strike but I couldn't get Mr. Condra, and I called Mr. Seroggs and I told him the company wanted to pay the men that 40¢ and get back to work because they needed very badly at this stage to continue operations. Mr. Seroggs says, "Oh, no. We can't do that. No, no, we can't do that at all. We will just have to see."

Q. Did you talk with any committee or local president?

A. Yes. We talked to the committee and local union president before we talked to Mr. Seroggs.

Q. What did they advise you? Who did you talk to, do you remember, the local committee?

A. I believe Grant Mullins was on the committee at that time, and Jim Scott and Bog Lovell, and either Ellis Lynn was the president of the local or Dana Muncy, I can't remember which right at that particular time.

Q. What did they advise you?

Mr. Kramer: We object to statements made by mem-
53 bers of the local as not being connected with the District nor being connected with International, and——

Testimony of Guy B. Darst

The Witness: I didn't say that—

The Court: Just a minute. Do not interrupt the attorneys. Do not do that any more.

The Witness: Excuse me.

Mr. Kramer: We understand under holdings of the Courts those statements by the local members, members of the local or the local committee, are not District officials and not International officials, and their statements cannot be binding or effective in any way on the District or International.

The Court: Those statements of the local men will not be considered in relation to the cross claim or the counter claim against the International Union and against the District 28, but they may be considered on this original claim of these Trustees against the Benedict Corporation. All right.

The Witness: I apologize for interrupting, your Honor.

The Court: That is all right.

Mr. Kramer: In order there be no question about the record, our objection goes clear across the field of our objection to that ruling without exception.

The Court: All right. You may answer, Mr. Darst.

54 The Witness: May I have the question again?

(The pending question was read by the reporter.)

The Witness: The local committeemen, is that what it was? Is that what he is referring to, Mr. Reporter?

Mr. Winston: Yes, sir.

A. They told us "we couldn't do a thing," in those words, that they couldn't do anything with the District saying so, and that is the way it was, "You get the District to tell us to go back to work and we would go back to work," and that is when I called Mr. Condra but I didn't talk to him and talked to Mr. Scroggs instead.

By Mr. Winston:

Q. Did you finally go back to work?

Testimony of Guy B. Dörst

A. We did not go back to work until after the Wage Stabilization Board had approved the payment of the additional 40¢ a day to the men.

Mr. Kramer: May I state another ground of our objection, your Honor. This is after, your Honor will recall, the 1952 amendment to the contract, and we respectfully submit that any such proof of course would not prove any violation of the contract—whether it may or may not be proof of a violation of the amendment, it could not be proof of violation after the amendment of 1952.

The Court: I do not get your point. What is the point you are making?

Mr. Kramer: The phraseology of the contract with reference to what the organization was to do or what was to be done by the parties, was changed by the phraseology of the 1952 amendment, and there were certain things that was provided in the 1950 contract that are left out of the 1952 amendment, and this is subsequent to the effective date of the 1952 amendment.

Here we deny there could be a violation of the contract as it existed from 1950 to 1952, but certainly under the phraseology of the 1952 amendment we do not think there could be any violation of the contract.

The Court: Now what is the change that you rely on in the 1952 amendment to sustain your point?

Mr. Kramer: To the sub-headings, your Honor, in the 1952 agreement—does your Honor have a copy of it?

Mr. Winston: It would be easier just to give him the exhibit.

The Court: Yes.

Mr. Kramer: Your Honor, is it not about time for a recess so we could let the jury step out while we present this?

The Court: I do not think so.

Mr. Kramer: If your Honor will notice in the 1950 agree-

Testimony of Guy B. Darst

56 ment under the heading of "Miscellaneous" there are, as I recall, four provisions—yes. It is on page 8 of the 1950 agreement.

The Court: Yes.

Mr. Kramer: If your Honor will notice under the 1952 agreement it provides that—on page 3 of the 1952 agreement—it says "Amend 'Miscellaneous' by striking out sub-section 4 and amending sub-section 3 to read as follows:" And then "Amend 'Miscellaneous' by adding thereto the following, to become sub-section 4:" and your Honor will notice the difference between those sections as expressed in the two agreements.

The Court: I overrule the objection. You may answer.

Mr. Winston: I think he has already answered it, sir.

Mr. Kramer: I think so, your Honor.

Mr. Winston: What was the question, sir?

(The last question was read by the reporter.)

The Court: Now, lady and gentlemen of the jury, you must keep in mind that under the rulings of the Court, which of course are binding on the Court and on this jury, the words and the actions of the members of the local union are not binding upon the International Union and its District No. 28, and you cannot consider any of their statements or their actions in relation to the
57 cross-claim of the Benedict against this International and its District 28 because what the local people did and what they said is not binding upon the International and District No. 28 unless they were acting as the agents or representatives of the International and District No. 28 in what they were doing and what they said and unless the International acquiesced in what they did, that is approved what they did.

Now you may consider, you may consider the witness' answer to that last question with reference to the local committee of the local union in passing on the claim of these Trustees who are suing to recover these welfare

Testimony of Guy B. Darst

benefits for the mine workers, under this agreement, including the mine workers who were employees of this Benedict Coal Corporation—I say, you may consider their words and actions in the consideration of this claim of the trustees against the Benedict Coal Corporation and in connection with the Benedict Coal Corporation's claim to set off any claim of the original complainants by reason of the alleged breach of contract, or breaches of contract, upon the part of the members of this local union.

You must keep those matters in mind throughout this lawsuit. All right, go ahead.

58 By Mr. Winston:

Q. Now, Mr. Darst, coming back in time sequence to Mr. M. M. Campbell.

A. Yes.

Q. Did you enter into any kind of contract or agreement with Mr. Campbell for any work on your job?

A. Yes. Do you mean by me the Benedict Coal Corporation?

Q. I mean the Benedict Coal Corporation.

A. Right.

Q. I will hand you what purports to be a contract and ask you if this is it, sir?

A. That is correct, yes.

Mr. Winston: We file this contract as Exhibit No. 4.

(Exhibit No. 4 was filed.)

By Mr. Winston:

Q. Now, sir; I notice in paragraph 3 of this contract, "It is agreed and understood between the parties that the party of the second part will carry adequate workmen's compensation insurance from a reliable insurance company and will operate under the compensation laws of the State of Virginia, thereby relieving the party of the second part of responsibility in case of accident. Second party is to furnish proof of coverage before work begins." Was proof of coverage furnished you?

Testimony of Guy B. Darst

59 A. Yes, it was.

Q. I hand you a letter and ask you if you received that?

A. Yes, we received that.

Q. What type work did you contract with Mr. Campbell to do, or did he contract with you to do?

Mr. Winston: We file this as Exhibit No. 5.

The Court: What is No. 5?

Mr. Kramer: A letter of compensation insurance carried. It shows compliance with one section of the contract.

(Exhibit No. 5 was filed.)

Mr. Winston: If the Court please, I would like at this time to read this contract to the jury. It is not so long. It may be pertinent.

The Court: All right.

Mr. Winston: This is under the letterhead of Benedict Coal Corporation, August 15, 1951.

“This Contract Agreement by and between the Benedict Coal Corporation, St. Charles, Virginia, hereinafter referred to as party of the first part, and M. M. Campbell, Contractor, Kanawha County, West Virginia and Pennington Gap, Virginia, hereinafter referred to as party of the second part, entered into this 15th day of August, 1951.

“Whereas party of the second part agrees to perform the construction work necessary for an 80 ton slate
60 disposal bin adjacent to the coal storage bin at the Benvir No. 5 mine of the party of the first part, and an aerial tram and bucket line for slate dumping into the next hollow to the east, including excavation, anchorage for cables, and foundations, under the following terms and conditions:

“1. All construction work as outlined above in connection with this project is to be accomplished for the sum

Testimony of Guy B. Darst

of \$12,500 which amount is to cover plans, use of tools, contractor services and labor. The party of the first part is to furnish construction supplies and materials through its purchasing agent according to bills of materials and specifications furnished him by the party of the second part.

"2. It is agreed and understood between the parties that the second party will keep the management personnel of the party of the first part informed as to plans and specification, and said plans and specifications are subject to approval by said personnel as well as bills of material before purchase.

"3. It is agreed and understood between the parties that party of the second part will carry adequate Workmen's Compensation Insurance from a reliable insurance company, and will operate under the compensation laws of the State of Virginia, thereby relieving the party of the second part of responsibility in case of accident.

61 Second party is to furnish proof of coverage before work begins.

"4. It is agreed and understood that party of the second part will begin work at the earliest possible date, and to push this project to completion consistent with weather conditions and the working of an efficient labor force under the amount of money advanced from week to week by the party of the first part. It is estimated that this project will require approximately 20 to 22 weeks, with no penalties for delays due to inclement weather.

"5. It is understood and agreed by and between the parties that party of the first part is to furnish money to the party of the second part at the end of each week's work for the purpose of meeting payrolls, the amount furnished to be applied against the total amount as outlined in paragraph 1 above, plus \$125.00 per week of 5 days or \$25.00 per working day for days worked as an allowance

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to cover use and maintenance of tools and services as boss of the party of the second part. Party of the second part is to keep his own records and payrolls, and is to also apply the \$25.00 per day allowances against the amount set forth above for the completed project.

62 "6. It is agreed and understood by and between the parties that any additional construction work, such as excavations and foundations, concrete pouring, additional bins or buildings, performed by party of the second part for party of the first part, will be agreed upon separately, but will be executed and carried out by second party under the terms and conditions of this contract agreement. It is also agreed that the additional time for such projects will not be counted as against the time referred to in paragraph 4.

"7. It is agreed and understood that responsibility for completion of this construction project rests upon the party of the second part, and that upon completion, operating tests will be made to insure satisfaction of the first party before acceptance by party of the first part.

"Witness hereunder by signatures of the parties hereto, this Contract Agreement, to be made binding upon both parties, this 15th day of August, 1951.

BENEDICT COAL CORPORATION,

By /s/ GUY B. DARST,

Vice President.

M. M. CAMPBELL, Contractor,

By /s/ M. M. CAMPBELL.

"Subscribed and sworn to before me this 15th day of August, 1951.

/s/ DEXTER RAINS,

Notary Public.

"My commission expires 2/16/55."

Testimony of Guy B. Darst

63 This Exhibit No. 5 is on the letterhead of Donaldson Insurance Agency, Inc., August 4th, 1951.

"Benedict Coal Company,
"Benedict, Virginia.

"Gentlemen:

"Re: M. M. Campbell, Pennington Gap, Va.

"Mr. Campbell has asked us to inform you that he is covered by Workmen's Compensation Liability Policy No. 01-569966 and Manufacturers' and Contractors' Liability Policy No. 53-177100.

"We hope that this is the information which you desire.

"Yours very truly,

"DONALDSON INSURANCE AGENCY, INC.,

"By: /s/ ELLEN RUTHERFORD."

By Mr. Winston:

Q. Now, did he start on any work before the contract was executed?

A. No, he did not.

Q. What did he do under the contract?

A. Correction. He may have for a day or two.

Q. He may have started?

A. Yes, he may have started but it wouldn't have been but a very short period.

Q. Did he start to work under that contract, sir?

64 What did he do under that contract, just tell the Court and jury.

A. He was hired to construct a slate disposal bin where mine cars with slate, individual mine cars with slate, which is waste, might or could be dumped in the same strip of coal cars and the coal cars not dumped.

This bin was to be adjacent to the coal dump bin which is from which the coal is fed up in the preparation plant.

Testimony of Guy B. Darst

It was to be carried across into the next valley on a cableway and the cable was to be suspended from towers high up in the air, all of which required some skilled men and somebody that knew what they were doing.

Q. What men did he employ when he started out, sir?

A. He had his own working force of men that worked with him, I believe, on a project he had had in Harlan County and brought them with him.

Q. What type of workers were they, I mean what trades?

A. They were carpenters and concrete mixers and people experienced in that kind of work, and rigging, and so forth.

Q. Did that job require skilled workers?

A. It did.

Q. How did he get along with the work?

A. Not too well. It was always—he could never put the forces to work. They wanted him to keep the
65 Benedict men, were insisting that the laid-off men—

Mr. Kramer: We object to that because it is either hearsay on this. Anything he heard the men say or anyone of that sort say, under your Honor's previous holding would be competent, but not this type testimony.

The Court: Mr. Darst, are you testifying from your own knowledge or what somebody told you on your own when these things—

The Witness: Yes, sir. We had several meetings.

The Court: Overrule the objection.

By Mr. Winston:

Q. Go ahead.

A. We had several meetings in which the Benedict committee and in which the District representative, Mr. Scroggs, he may not have been at more than one or two, insisted that Mr. Campbell hire and work several Benedict men who were coal miners and who were laid off at the time.

Testimony of Guy B. Darst

Q. Were these laid-off coal miners also carpenters?

A. No, they were not.

Q. Or skilled trade other than coal miners?

A. They were coal miners but nothing else.

Q. How did he get along that Fall?

A. I didn't hear the question.

Q. How did Mr. Campbell get along on his job that Fall, that is, the Fall of 1951?

66 A. Well, he worked along and was getting up material and pouring the concrete footings and things like that all along. Mr. Campbell was asked, in my presence, to hire Benedict men and work them in his working force.

Mr. Kramer: By whom? I think we are entitled to know.

Q. Who asked?

A. By the Benedict mine committee.

Mr. Kramer: We are continuing our objection to the local, and I assume that may show in the record without my stating every time?

The Court: Well, I think it is proper to object each time. The same ruling. So that I know what you have in mind.

Mr. Kramer: Does your Honor want me to state the ground again?

The Court: Well, I think you have stated the ground. If you have any additional ground.

Mr. Kramer: I have no additional ground; same reason as given.

The Court: Same ruling.

I repeat to the jury that what the local members of the union did is not binding on the International Union or the District 28 insofar as it relates to the claim of
67 Benedict against the International Union and its District 28.

Testimony of Guy B. Darst

It is not binding unless the International acquiesced in it or unless the local members were acting as agents or representatives within the scope of their authority for the International and its District No. 28, or one of them. Go ahead.

By Mr. Winston:

Q. Were Mr. Campbell's original employees members of the United Mine Workers of America?

A. I cannot answer that accurately. It seems to me that part of them were members of a union, but I don't know whether it was AF of L or UMWA or what.

Q. Did you have any further negotiating there in January of 1952?

A. Yes, we did.

Q. What happened at that time?

A. We had a meeting on or about January 15th.

Q. Who was at the meeting?

A. Mr. Campbell, myself, Mr. Robert Fortner, who was the mine superintendent, Mr. Scroggs and the local committee composed of at that time Grant Mullins, Jim Scott and I believe Bog Lovell, and Mr. Ellis Lynn, the president then of the local.

Q. What went on in that meeting?

68 A. It was a meeting to try to resolve the question of whether or not Mr. Campbell would work Benedict men or not. Mr. Scroggs made the statement that if the mine worked Benedict men was going to have to work on the Campbell working force.

Q. What mine was he talking about?

A. Talking about the No. 5 mine, the one mine that Benedict was operating at that time.

Q. At that time did Mr. Campbell have a contract with the United Mine Workers?

A. I do not believe so. Mr. Campbell had done some dynamiting and shooting inside a shop building that we

Testimony of Guy B. Darst

were constructing to make what you might call a grease rack down in solid rock. He was asked to do that shooting inside of the building without blowing the building down.

He was capable of doing that and no other men on the job at Benedict could do it. By that I mean, no other men, even the underground miners who were used to handling explosives.

After he did that job they were insistent that he, more insistent than ever that he work Benedict men and sign a United Mine Workers contract.

Mr. Kramer: Now I object unless he identifies who they were.

The Court: Objection. is sustained unless they were——

69 By Mr. Winston:

Q. Who were they?

A. The mine committee and the president of the Benedict local.

Mr. Kramer: Same objection as previously, your Honor.

The Court: Same ruling with the explanation made to the jury.

A. (Continuing) And Mr. Scroggs who was in the January 15th meeting.

By Mr. Winston:

Q. Were any words passed at that meeting between Mr. Campbell and Mr. Scroggs or any of the committee, there?

A. Yes. Ellis Lynn called Campbell a worker of seab labor.

Mr. Kramer: Of course, your Honor, I am continuing my objection to Ellis Lynn who was president of the local and not an officer of the District or International.

The Court: All right, same ruling.

Mr. Kramer: I hate to keep repeating but if your Honor thinks I should I will. Where it covers the same field, I think my objection is sufficient.

Testimony of Guy B. Darst

The Court: Yes, where it covers the same field, but if there is any new point or point that you think should be brought to my attention, I think you should do
70 it.

Mr. Kramer: In other words, I consider that line of testimony objected to.

The Court: I overrule the objection to the extent heretofore indicated.

By Mr. Winston:

Q. What was Mr. Campbell's reaction, sir?

A. Mr. Campbell's reaction was very violent. He lost his temper, and very nearly climbed across the desk that we were all sitting around, and I think we had to restrain Mr. Campbell.

He said he had been in the United Mine Workers when they were first started, that his father was a member of the United Mine Workers and he had been in and out of the union fields all of his life and that nobody could call him something like that and get away with it. There was a lot of profanity, too, which I won't repeat at this time.

Q. Well, sir, did you have any trouble there at your mine after that meeting?

A. After that meeting, yes, we had a strike in February, early February. I believe it was the——

Mr. Kramer: Did the witness fix the date of that meeting?

Mr. Winston: I think he did.

The Witness: The meeting was, according to the
71 notes I had, it was in my office on January 15th, 1952.

By Mr. Winston:

Q. Well, what happened after that, did Mr. Campbell do what the union told him to?

A. No, he did not. And on February 7 and 8th, the afternoon of the 7th and 8th, we had a strike.

Testimony of Guy B. Darst

Q. Did you know what the strike was over?

A. The strike was over Mr. Campbell not working Benedict men and not belonging in the United Mine Workers.

Q. What was the results of that strike?

A. We had been told by Mr. Scroggs that the Benedict mine would not work unless Mr. Campbell signed a contract. Mr. Campbell then went to Norton with several of the men and——

Q. Did you go to Norton with Campbell?

A. I did not. All I know is they went to Norton and signed a contract.

Mr. Winston: I mean, that may be hearsay unless you went there with them.

Mr. Kramer: I expect it is more than maybe. It is of course, and we would object if he attempted to testify to it.

The Court: Sustained.

By Mr. Winston:

Q. Did he continue working the way he was on your project?

A. Yes, he did, intermittently. We had a half-day strike in March over Mr. Campbell, and we had another one for two days in April of 1950.

Mr. Kramer: That is not charged in the pleadings, your Honor. We have no notice of it.

Mr. Winston: We do not claim damage on that.

The Court: All right.

By Mr. Winston:

Q. Coming to April, sir. Did you have one on April 25th and 26th of 1952?

A. We had one on April 24th and 25th, which I believe is on Thursday and Friday of that week.

By the Court:

Q. That is 1952, as I understand?

A. 1952; yes, sir.

By Mr. Winston:

Testimony of Guy B. Darst

Q. What was that strike over, sir?

A. Still not working Benedict men.

By the Court:

Q. You mean Campbell not working—

A. Campbell not working Benedict men, and his men not being taken into the local union after he went to Norton and signed a contract.

Q. Do you know how that strike was resolved?

73 A. Campbell tried to work a day or two after that and laid off a while and did not work on the Benedict project, and the Benedict men then went on back to work.

Q. Now that second strike, was any offer made to Benedict to arbitrate?

A. Yes. We wanted them to arbitrate again.

Q. Was the committee willing to do so?

A. They were not willing to do so.

Q. Now, sir, did Mr. Campbell finish up the job?

A. No, he did not.

Q. How far along did he get?

A. The job was, I would say, 60 percent completed. He still had a lot of work to do. Normally he should have been through in this length of time, intermittent disputes and the fact that he couldn't put as big a force of men to work—

Mr. Kramer: I object as a conclusion. Mr. Campbell can testify whether he couldn't but—

The Court: Overrule the objection. You may answer.

A. (Continuing) Couldn't put as big a working force to work as would have speeded the work up, and the project was not completed. Mr. Campbell worked along a little while after May with a very small working force and finally threw up his hands and had to quit.

Mr. Kramer: I object to that last statement. It is
74 a pure conclusion, "had to quit."

Testimony of Guy B. Darst

The Court: Now, Mr. Witness, are you testifying from your own personal knowledge as to what you are saying about having to quit, or are you testifying from what somebody else told you?

The Witness: I am testifying from my own personal knowledge.

The Court: Overruled.

The Witness: A conversation with Mr. Campbell.

Mr. Kramer: That is what I thought.

The Court: Sustained. That is not competent; that is not competent. That would be hearsay testimony. If you know, if you are on the ground and saw yourself what took place and you are testifying about that—

The Witness: Well, the first part of my answer was obtained because I was there on that job every day and saw what was going on.

The Court: The objection is overruled to that part.

Mr. Kramer: The only objection I had to that answer was, outside the general objection I have heretofore had, was that "he had to quit," and he says he bases that on the statement Mr. Campbell made.

The Court: That was sustained.

75 By Mr. Winston:

Q. Do you know when Mr. Campbell finally quit, sir?

A. In late July or early August. The Benedicts payments to Mr. Campbell will bear that out. I don't remember the exact date.

By the Court:

Q. Is that 1952?

A. Yes, sir.

By Mr. Winston:

Q. Did Benedict get any use out of this work he did?

A. Not any.

Q. Did you have any rope or cable that was being installed?

Testimony of Guy B. Darst

A. Yes. The inch and three-quarters cable had been strung for 2,400 feet on which the bucket would have ridden, being pulled by another smaller cable that had been strung out preparatory to putting up through the towers which had been completed. The bucket and trigger works and the bin had not been completed.

The Court: Take a recess, gentlemen.

(A short recess was had.)

The Court: You may continue with the witness.

By Mr. Winston:

Q. Coming back to that cable matter, I believe you testified about certain cable that was there, or rope.
76 What happened to that rope or cable, sir?

A. In the fall of 1952 there was a forest fire all over the country and that rope got burned over. It was laying on the ground in the summer of 1952 ready to be suspended but the forest fire got it in the fall of 1952.

Q. Had it been suspended would the forest fire have gotten it?

A. No.

Q. Now, sir, what did the rope cost?

Mr. Kramer: We object to that. It is not an element of damages in this. It throws no light on this, some rope on the ground that some forest fire burnt up, and could not in any way be considered a measure of damages and therefore it is irrelevant in this suit.

The Court: Mr. Winston, what is the relevancy of that testimony?

Mr. Winston: I believe one of the items is that he lost the money he had in it, that would be bearing on the money he had in the job.

The Court: Overrule the objection. You may answer.

A. A cable of that sort and type would cost about \$2.50 to \$3.00 a foot.

Q. How long was it?

Testimony of Guy B. Darst

A. 2,400 feet long, I believe.

Q. And what would be the total cost?

77 A. Well, at \$3.00 a foot, in round numbers, the cost would be \$7,200.00. \$2.50 a foot would be about \$6,600.00.

Mr. Kramer: Do we understand from the witness he says that is what it cost him?

The Court: I do not know.

Mr. Kramer: I don't either and I don't understand this.

By the Court:

Q. The test is the reasonable value, the market value of the rope before it burned.

A. The cost of replacement in 1952 would be the figure that I showed you.

Mr. Kramer: We object to this type evaluation, your Honor. We do not think it is competent, relevant and material.

The Court: Well, it is indefinite.

By Mr. Winston:

Q. Now, sir, did you at one time employ or have a contract with a strip operator, a strip company?

A. I did. Yes, we did.

Q. Who was the company?

A. It was the Swisher Coal Company.

Q. Who was the owner of that?

A. A fellow by the name of Ura Swisher from Ohio came down and Benedict leased to him two upper seams
78 for stripping recovery around the contour crop line of the seam.

Q. When did he come in there, sir?

A. He moved in about—he moved in there in April and ready to run coal about May 1st.

Q. What was the nature of your lease with him?

A. In 1953. The lease was that Benedict would purchase and process—

Testimony of Guy B. Darst

Mr. Kramer: I object. This lease is a written instrument and we object to this.

The Court: Well, it is sustained because the lease would be the best evidence.

By Mr. Winston:

Q. Were Mr. Swisher's workers members of the United Mine Workers?

A. No, they were not.

Q. When did he start operating?

A. He started operating on May 1st, I believe, or around that date.

Q. Is that 1953?

A. 1953.

Q. How many employees did he have?

A. Had about 20 at the time. He started operating on a one-shift operation.

Q. What type equipment did he have?

A. He had large steam shovels, bulldozers, and a
79 giant boring machine that bored into the seam of coal.

The Court: Swisher is the same as the Big Mountain Coal Company?

Mr. Winston: Yes, sir.

Mr. Kramer: Swisher Coal Company is used interchangeably in this record.

The Court: All right.

By Mr. Winston:

Q. How far was his operation from the operation of the Benedict Coal Corporation, the deep mine operation of the Benedict?

A. About two and a half miles up the mountain.

Q. Did he and his workers have to go by the Benedict Coal Corporation in order to get up to his operation?

A. They did.

Q. After he started operating there did you have any trouble?

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A. Yes, we did.

Q. What type trouble did you have, sir?

A. We had a strike beginning on the 18th of May that lasted through the 27th of May. The dispute was over whether or not Swisher, or the Big Mountain Coal Company, as it was finally named, whether the employees of that company would go into the Benedict local or have a separate local of their own which they wanted.

80 They were perfectly willing to join the United Mine Workers but they wanted a local of their own, a local union.

The Court: This date of May 18 through 27, is that in the year 1953?

Mr. Winston: Yes, sir.

By Mr. Winston:

Q. Now, sir, did you, in company with others, have any conference with any officers of the District No. 28 about that?

A. Yes, we did.

Q. When and where?

A. About the time they were getting ready to run coal, or after they were getting ready to run coal, that is the Big Mountain Coal Company, the Benedict Coal Corporation, Mr. Swisher, the owner of the Big Mountain Company, Mr. Dexter Rains and I, went to see Allen Condra in his office in Norton, Virginia.

Q. What position did Mr. Condra have?

A. He was president of the District 28.

Q. Go ahead, sir.

A. We went to his office to sign a contract.

Q. What happened at his office?

A. With the request to sign a contract there was a request that the employees of the Big Mountain Coal Company be given their own local union, and Mr. Condra
81 flatly refused to let the Big Mountain Coal Company have their own local.

Testimony of Guy B. Darst

Q. Did he make any further statement there in regard to Benedict?

A. Yes, he did.

Q. What did he say, sir?

A. He said, "You are going to have an awful lot of trouble down at Benedict out of the Benedict men if you don't sign this contract."

Mr. Kramer: Just a minute, before we go further. I want to object to this line of testimony which is subsequent to the 1952 amendment. We think the contract different from the prior without conceding, of course, that it would be competent as to the previous contract. We have the additional ground that it could not be a breach of the 1952 amended contract. In addition, there are the other objections heretofore made.

The Court: Objection is overruled.

Mr. Kramer: That objection, of course, is for the International and District both.

The Court: Overruled.

By Mr. Winston:

Q. At that time did Mr. Swisher agree to sign a contract which would have required his men to join the Benedict local?

A. At first the name of the Big Mountain Coal
82 Company had not been chosen. It was just an off-shoot of Swisher Coal Company from Ohio.

Mr. Swisher offered to go ahead for a few days until his attorneys had picked a name, which subsequently turned out to be the Big Mountain Coal Company, to pay dues, pay welfare and pay union scale and sign the contract when the name had been chosen.

Mr. Condra said, "No, you can't operate that way. You will have to sign a contract right here."

And Mr. Swisher and Mr. Condra nearly got into it over that. Nothing violent but Swisher said, "Damn it, if

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you can't trust me for a few days I can't trust you. We will operate anyway."

Q. Well, at that time did Mr. Condra say anything about his efforts to make him sign the way he wanted?

A. After Mr. Swisher made that remark, Mr. Condra says, "We will do everything in our power to keep you from operating." Those are exact words.

Q. How did that matter resolve itself with Mr. Condra, that you and Mr. Swisher had with Mr. Condra?

A. We agreed to sign a contract when the name had been chosen provided, and with the qualification, that the employees of the Big Mountain Coal Company—I say "we", I mean I was sitting there in the middle—Mr. Swisher agreed to sign a contract provided that his
83 employees were granted their own local charter for a union, local union in the United Mine Workers.

The contract was brought down and Swisher signed it a few days after that. Swisher's employees held out for their own local union.

Q. Well, when he signed it was it under any reservation or condition?

A. Yes, that he get his own local.

Q. Did he get his own local right away?

A. No, not until after the strike.

Q. Well, you say after the strike. What happened after that, after you had that meeting up in Condra's office and after you say he signed the contract with that reservation?

A. Condra, before the meeting broke up, Condra said, "I am the man that decides whether or not you get your own separate local or whether those men go to the Benedict local."

Mr. Swisher's men and Mr. Swisher wanted a separate local for obvious reasons. He is engaged in—

Mr. Kramer: We object to the conclusion of the witness, stating the reasons.

— 100 —

Testimony of Guy B. Darst

The Court: Yes. Sustained.

By Mr. Winston:

Q. Let me ask you this: What type work did Mr. Swisher's men do?

84 A. They operated big heavy machinery, steam shovels and bulldozers and air compressors and augers, boring machines, and the like.

Q. What type mine did he have?

A. An outside, open air strip mine.

Q. Now, what type work did your men do, that is the men that worked in your mines?

A. They were underground, deep mine coal miners.

Q. Was that the same type work as Mr. Swisher's men did?

A. No, it is not.

Q. Was it the same type of mining?

A. No, it was not the same type mine.

Q. Did you have any trouble there on about May 18, 1953, at your mine?

A. Yes.

Q. What happened?

A. Benedict Mine came out on strike and formed a picket line, 25 or 30 of the Benedict men, in the middle of the road, the access road to Mr. Swisher's operation.

Q. What effect did that have on Mr. Swisher's operation?

A. Closed him down. It prevented his men from going to work.

Q. How long did the men in your mine stay out?

A. I was told later——

Mr. Kramer: We object to that.

85 The Court: Sustained.

A. Stayed out until the 27th.

Q. Did you have an opportunity to open back up before the 27th?

Testimony of Guy B. Darst

A. No.

Q. I mean, were the men willing to come back to work before the 27th?

A. That is what I was told, that they were willing, but I was not notified until up through the middle of the week, of the week beginning May 18th.

Q. For what reason did you wait until the 27th or the 28th to go back to work?

A. On May 18 we had a late order to the Great Lakes which we were supposed to load and get on wheels by the—on railroad wheels—by the end of that week, and that is only five days.

The compartment on a boat on the Great Lakes holds about somewhere between 1,800 and 3,000 tons. We have to get the stuff on wheels when they say or it will miss the boat and they will have to pay demurrage on the railroad cars.

Mr. Kramer: I object to that. The witness is testifying about a written instrument and it is the best evidence, and we object unless it is introduced.

The Court: Are you talking about the lease?

Mr. Kramer: About the contract for the sale of this
So coal.

The Court: Are you testifying about what you know personally, is that correct?

The Witness: Yes, sir.

The Court: Overrule the objection. Are you talking about the strike in May which ended May 27th, 1954?

The Witness: 1953, yes, sir.

Mr. Kramer: And, your Honor, he is testifying, if I might make a statement, about a written contract he had for the sale of certain coal which he said had certain requirements, and he is relating the terms of the written instrument and we most respectfully insist that the written instrument itself is the best evidence.

Testimony of Guy B. Darst

The Court: If he is testifying about any specific contract that would be the best evidence, but as I understand you are talking about a deal with the people who buy coal that is shipped to the Great Lakes, to one of the Great Lakes, is that right?

The Witness: Yes, sir.

The Court: And the operation that requires.

The Witness: Yes, sir.

The Court: Overrule the objection.

A. (Continuing) We had, I believe, four cars of the grade and size carried over from the preceding week on Monday morning, May 18th. Those four cars were
87 shipped to the Lakes. We will be able to disclose a little later some documentary evidence to this shipment.

Mr. Kramer: That is the reason I am objecting.

The Court: Of course, if he is referring or testifying about matters which are reduced to writing his testimony is not competent.

I thought he was testifying about the method of operation or method of dealing between his company and the Lake coal buyer, but if he is testifying about what is in written instruments then the objection is sustained.

Mr. Kramer: I am basing it on pre-trial disclosures, your Honor. There may be other things I don't know about, but under the pre-trial the instruments he is talking about, and I do not think it is competent and I have objected from the beginning—

The Court: It is not if that is correct.

Mr. Winston: Well, sir, I think not about the details of the written instrument, but he can state there were such instruments.

The Witness: May I volunteer this, your Honor?

The Court: Yes, sir.

The Witness: We will be able to disclose that there was an order to the—

Testimony of Guy B. Darst.

Mr. Kramer: That is it exactly, and I move to strike his testimony.

88 The Court: The motion is granted. The order will speak for itself. All testimony based on the order, or the explanation of an order, is excluded because the order itself is the best evidence.

By Mr. Winston:

Q. Did you fill the order?

A. No, we did not.

Q. Why didn't you?

A. Well, the men were on strike and we could not produce the coal in time enough to meet the boat.

Q. And for what reason did you not go back the latter part of the week, of the 18th?

A. We did not know when we would get other business to resume operations and did not get other business to resume operations in the No. 5 mine until up into the following week.

Not only that but the Benedict Coal Corporation had to have the production of the Big Mountain Coal Company which was 800 to 1,000 tons a day to help reduce its own overhead costs per ton.

Q. Well, was Big Mountain operating at that time?

A. Yes.

Q. I mean during the time of the strike?

A. No.

Q. Why weren't they operating?

89 A. They were being picketed by the Benedict men and kept from going to work.

Q. How did your strike end, or your work stoppage end?

A. It ended simultaneously with when we got another Lake order and with the ending of the Benedict strike against the Big Mountain Coal Company to force the Big Mountain employees into the Benedict local.

Testimony of Guy B. Darst

Q. Do you know how the trouble that Big Mountain had ended?

A. Yes.

Q. Did they go back to work?

A. Yes, they went back to work.

Q. Under what conditions?

A. Mr. Swisher got an injunction against the union to prevent them from picketing him.

Q. How long did Benedict continue in operation?

A. Benedict continued operation through June and July of 1953.

Q. Now, sir, Mr. Rayson in his opening speech stated that the reason they struck on you in May, 1953 was because you had not, you were not up on your royalties. Did anybody, any committee member or any person tell you at that time that was the reason for the strike?

A. No, did not. Benedict had not paid any welfare 90 since January or February—

By The Court:

Q. What year?

A. 1953—possibly March. In January, February or March, we had not paid any welfare and we had been paying it when and as we could get the money together in order to keep running.

Q. I think Mr. Rayson also stated that you waited until some late date to put in some claim for damages. I will hand you a letter dated May 20, 1953, which is the third day of this strike, to Mr. John L. Lewis, and ask you to read that to the jury.

Mr. Kramer: Just a minute. Let's see that.

Mr. Winston: (Handing to counsel.)

By Mr. Winston:

Q. Will you read that to the Court and jury, sir? First, I will ask you if that letter was mailed to the party indicated?

A. Yes, it was.

"Benedict Coal Corporation, St. Charles, Virginia, May 20, 1953.

"Mr. John L. Lewis, President

"United Mine Workers of America

"Washington, D. C.

"Dear Mr. Lewis:

91 "This letter is to advise that this company has been operating under and living up to its contract with the United Mine Workers of America, but that beginning Monday morning, May 18th, this mine was shut down illegally by your Union.

"We are writing to advise that we intend to hold your Union responsible for the damages which your members are causing us through this illegal work stoppage.

"Yours very truly,

/s/ GUY B. DARST,

"Vice President."

With a copy to Mr. Allen Condra, President, District 28, Norton, Virginia.

Q. Now, sir, prior to the time you sent this letter had the union or anybody there stated to you that this strike was caused by your being behind in your royalty payments?

A. No.

Mr. Winston: We will file this as Exhibit No. 6.

(Exhibit No. 6 was filed.)

By Mr. Winston:

Q. Now, sir, prior to the time that you mailed that letter had you indicated to any member or officer of the union that you were going to hold them responsible for damages?

A. Of the local union?

92 Q. Yes, sir.

A. Yes, sir.

Q. What had you told them?

Mr. Kramer: Of course, your Honor, we are continuing our objection to the local union.

A. To the president and the committee, we indicated to them, and the District, that we were holding them responsible and that I was writing this letter to John L. Lewis.

Mr. Kramer: Will you read the answer, please.

(The answer was read by the reporter.)

By Mr. Winston:

Q. Had you threatened to sue the union any before that?

A. Yes, several times.

Q. Do you remember any of the particular times?

A. Yes.

Q. When?

A. When we discharged the two men over the locomotive going over in the creek. I call Mr. Scroggs up on the telephone and told him, "Lloyd, it looks like we are going to have to sue in order to get any cooperation down here."

That was one time.

Q. What did he say?

A. And various meetings with Mr. Scroggs and Mr.
93 Clark who succeeded him.

I told them I was going to have to sue. Mr. Scroggs' reply was, I think, was that all you can think about doing down there.

I told him yes when we couldn't get any action any other way.

Q. Coming to this chart, did you prepare this?

A. I did.

Q. Would you tell the Court and jury—could he come down here, sir?

The Court: Yes, sir. Give him the pointer, Mr. Marshal.

Testimony of Guy B. Darst

Mr. Kramer: May it please the Court, for the record, so it will be clear, we object to the introduction of this chart to the extent that it has any indication on it times not covered by the pleadings in the present lawsuit. If they are eliminated we have no objection to it. To that extent we think it is highly improper and incompetent and should not be admitted.

The Court: Well, what is the theory of the Benedict Corporation on that, Mr. Winston?

Mr. Winston: Your Honor, as I have stated certain stoppages were at such times that although they may have been breaches of contract they were not damaging because they were short work periods. They have been indicated in here to show the general pattern and the circumstances they used to adjudicate their disputes and the general pattern of strikes.

Mr. Kramer: There is no such averment in the pleadings at all, your Honor. The pleadings are limited to specific times, dates and occurrences, and that is all of course we came prepared to meet.

Mr. Winston: In your pre-trial discovery, was that covered, do you recall?

Mr. Kramer: There is nothing in there at all. I tried to go through it yesterday.

The Court: Mr. Winston, if you are not suing for damages except those specific dates I do not think that you should refer to any of the dates except those for which you claim damages, because if you present the other dates it is likely to be too confusing to the jury and I do not see any purpose of bringing in other dates.

If you can tell me the purpose, and if it is a legal purpose, then I will allow you. But it should seem that it would make your map ambiguous to the jury if you have dates which are not the basis of strikes that caused damages to your company.

Mr. Winston: Yes, sir. My theory is that it shows the system, a pattern.

95 The Court: How will that help the jury? The jury has to decide this matter according to the pleadings of the parties and according to the evidence and the charge of the court. If you bring in extraneous matters that, instead of being helpful to the jury, would seem to me to be hurtful to the jury because it just adds to the complexity of the lawsuit.

Mr. Winston: Yes, sir. I could suggest this, sir, as Mr. Darst identifies the strikes, identify those for which we are claiming damages, and those strikes which happened but which we are not damaged by, I could circle or he could mark them out.

Mr. Kramer: I suggest, your Honor, or object to that method. Counsel has another method handy if they want to do it. I think it should be done and it should be done properly. This thing of trying to do something and cover it up—I am not using that in the slang expression, but I mean by the eradication of it and still leaving it physically present is not in my opinion proper, and I object to that method.

The Court: Do you have any date on there that is not covered in the pleadings except some dates which you say strikes occurred but which are not the basis of either an action for damages in your cross claim or the basis of an offset to the original claim?

96 Mr. Winston: Judge, I don't follow you——

The Court: I say, I see many red dates on that map indicating strike dates. Now I am asking you if any of those days are outside of the pleadings, meaning by that have you failed to name any of those dates in your pleadings, claiming that strikes occurred on them and for which you are entitled to recover damages?

Mr. Winston: Yes, sir. Some of them are things that are named in the pleadings.

Testimony of Guy B. Darst

The Court: Some are not named in the pleadings?

Mr. Winston: A few.

The Court: All right. If they are not named in the pleadings, why do you want to examine the witness about them in the presence of the jury?

Mr. Winston: As I stated it shows the system. Although we claim no damages it shows the system and it is evidence of the other strikes.

The Court: Well, evidence of other strikes. As I understand there is no issue on the strikes. The issue is who caused them and responsible for them, isn't that true?

Mr. Kramer: It probably is. There were two, your Honor, and they withdrew those. I have to check my files. I stated this morning there were some but they have withdrawn two of them.

97 I was under the impression there is one more but I cannot be certain at this time. I thought there were three. They withdrew two this morning.

The Court: The court holds that at this time he can point out the strikes occurring on those dates for which the company is not claiming damages as a result of them. I hold that is competent to show the entire picture to the jury.

Now do you have any other date in that category that is on that map?

Mr. Winston: There are some, some half-days.

Mr. Kramer: Can we step to the bar, your Honor?

The Court: Yes.

(A discussion was held at the bar out of the hearing of the jury.)

Mr. Milligan: If your Honor please, we have some more graphs or exhibits, or whatever you may call them, compilations, and in view of the withdrawal of the March 6, 1950, and one other date, we are going to have to revise them, and if your Honor could indicate, if I might ask if your Honor is going to hold—

The Court: I think I will adjourn at 5:00. I will let him testify. This jury is an intelligent jury and he can testify as to the dates on which he claims strikes occurred and on which he claims he was damaged and just leave it and tonight you can make a new map.

Mr. Milligan: The reason I asked was so we can revise these exhibits and will not have these problems tomorrow.

The Court: It is not going to delay the trial?

Mr. Milligan: No. I think, in fact, it will expedite matters.

The Court: I want to get in this other 10 minutes this evening, and if you can ask him questions just on the dates I will let you do it and tell the jury those other dates have nothing to do with the lawsuit, but if you cannot I will just have to recess or pass on to something else.

Mr. Milligan: If your Honor pleases, I believe we can save the 10 minutes in not having to point these out and we can start new in the morning.

Mr. Kramer: As much as I like to disagree with opposing counsel, I believe that is one statement I can agree with.

(A discussion was had off the record.)

The Court: Is there anything else before we adjourn?

Lady and gentlemen, keep in mind the instructions that I gave you. Don't talk about the case, don't let anybody talk to you. Adjourn Court until 9:00 o'clock tomorrow morning.

(At 4:55 p. m. Court adjourned until 9:00 o'clock a. m., Tuesday, March 20, 1956.)

Tuesday, March 20, 1956.

(At 9:05 a. m. Court reconvened pursuant to adjournment when the following proceedings were had in the presence of the jury, to-wit:)

The Court: Gentlemen, call your next witness.

GUY B. DARST,

a witness on behalf of the defendant-cross plaintiff, resumed the stand and further testified as follows:

Direct Examination (Continued).

By Mr. Winston:

Q. Mr. Darst, would you come down here, please sir?

A. (Witness complies with the request of counsel.)

Q. Mr. Darst, this chart that we have on the blackboard, did you prepare this?

A. I did.

Q. Will you tell the Court and jury what that represents, first the calendar portion?

A. The calendar represents the period of time that this case is about, from 1950 in March through 1953, and the chart only shows through June. Did not have room to put July on but there were no strikes in July.

The red spaces indicate strike days.

Q. Another question. I notice these calendars have only five blanks across there. What is the reason for that?

101 A. That is to save space and to eliminate Saturdays and Sundays. We show only the work day week. Monday through Friday, in five spaces.

Q. What are the blue marks?

A. The blue marks are holidays, such as Labor Day, Thanksgiving, Christmas, April 1st, which is the holiday

called for in the contract, and the miners' vacation period, which always falls around the week of July 4th.

The Court: Do you expect to file the calendar as an exhibit?

Mr. Winston: Yes, sir.

The Court: That will be No. 7.

(Exhibit No. 7 was filed.)

By Mr. Winston:

Q. What are the red marks?

A. The red marks indicate days that the mines were struck and for which the Benedict Coal Corporation is claiming damages.

Q. Do they represent all the strikes you had during this period?

A. No, they don't represent all the strikes we had during this period.

Q. But what type strikes do they represent?

A. They represent damaging strikes, which means the mines could be run on those work days if the strike
102 had not occurred.

Q. Will you take a pencil and I will go strike by strike. You have already testified about certain of the strikes and causes of them starting over in April, 1950. There I see you have two red marks, I believe the 14th and 17th?

A. That is correct.

Q. What strike was that, sir?

A. That was the strike over the lay-off at No. 7 mine and the placement of those men.

Q. Would you mark on there some kind of identification so the people can read it?

A: Lay-off strike?

Q. Yes.

A. All right. (Witness marks exhibit.)

Q. We come to September, 1950. What was that strike over?

Testimony of Guy B. Darst

A. That was the strike over the water shortage. An act of God strike. You might call it water strike.

Q. All right.

A. (Witness marks exhibit.) All right.

The Court: Your dates in September are what?

Mr. Winston: 27, 28 and 29th, sir.

By Mr. Winston:

Q. Coming to January, 1951, 10th and 11th of January.

103 A. That particular strike was over the men bucking up on that foreman, Jim Collingsworth, and wanting him discharged.

Q. Identify that, sir.

A. Collingsworth strike?

Q. That will be all right.

A. (Witness complies with request of counsel.) All right.

Q. July 30 and 31st.

A. That was the strike over the vacation pay being withheld on some of the men who owed the company.

By the Court:

Q. What year?

A. 1951. Strike over vacation pay?

By Mr. Winston:

Q. Yes.

A. All right. (Witness marks exhibit.)

Q. Coming down to October of 1951, I think the 2nd through the 8th, half on the first.

A. That was the strike over the cutting off of credit for non-employees.

By the Court:

Q. What are the dates there?

A. 1st through 8th, leaving out Saturday and Sunday.

Q. And what did you say is the cause of that?

104 A. The cutting off of credit to non-employees. Call that the credit strike?

Testimony of Guy B. Darst

By Mr. Winston:

Q. That will be all right, sir.

A. (Witness marked exhibit.)

Mr. Kramer: I don't understand that because yesterday that statement was made, your Honor, and it was a cutting off not of non-employees but employees who were temporarily cut off.

The Witness: The same thing.

Mr. Kramer: The ones temporarily cut off?

The Witness: They were not on the payroll.

Mr. Kramer: So it is not something else.

By Mr. Winston:

Q. November 2nd and 7th, 1951?

A. Discharge of the man over absenteeism. Discharge strike.

Q. What was the man's name?

A. Ernest Tabor. Tabor strike?

Q. All right, sir.

A. (Witness marks exhibit.)

Q. February, 1952. I see you have a half-day in February and a whole day on the 8th—half-day on the 7th and whole day on the 8th?

A. That's right. The strike started midway of 105 February 7. I believe our pleadings only had the 8th in it, or did it?

Mr. Kramer: That is correct.

A. (Continuing) Pleadings show only the 8th. That is the contractor's strike, Campbell strike, one of them.

Q. All right, sir.

A. (Witness marks exhibit.)

Q. April 24 and 25, 1952.

A. That is the second strike over Campbell, the contractor.

Q. Identify that, sir.

A. All right. (Witness marks exhibit.)

Testimony of Guy B. Darst

Q. Coming to August, 1952, the 5th and 6th.

A. That is the strike over the discharge of the two men for running the locomotive and mine cars over the bank:

Q. All right, sir. Identify that.

A. Discharge strike or the two men's names were Roark and Anders.

Q. Either way would be all right.

A. Discharge strike?

Q. All right.

A. All right. (Witness marks exhibit.)

Q. October. You have one from the 16th to the 28th, 1952.

A. That is the Wage Stabilization Board strike over
106 the 40¢.

Q. Is that the strike over the increase wage?

A. Increased wages, yes.

Q. Identify that, sir.

A. W. S. B. 40¢ strike?

Q. That will be all right.

A. All right. (Witness marks exhibit.)

Q. Now coming to 1953. You have a strike on May 18th through 27th. Will you identify that one, sir.

A. That is the strike over the Big Mountain Coal Company employees not joining the Benedict local union.

Q. Identify that then, sir.

A. Strike over Big Mountain?

Q. All right.

A. All right. (Witness marks exhibit.)

Q. Now, sir, during each of these periods you have identified, had the men not struck would you have worked?

A. Yes, we would have worked.

Q. Now, as you went along on these strikes, I believe I asked you about your effort to arbitrate and the attitude of the union toward arbitration. Can you tell the Court and jury which of these strikes the company, or you, attempted to arbitrate and the union refused?

Testimony of Guy B. Darst

A. We tried to arbitrate all of them except possibly the water strike, and the water strike and water shortage was caused by an act of God.

107 In all cases we asked them to arbitrate and we were turned down on it.

Q. What about the W. S. B. strike, do you recall about that?

A. The way that happened, we offered to pay the employees the 40¢ a day additional in order to get them to go back to work, but we were turned down by the District.

Q. Was anything said about arbitration, I mean?

A. Well, yes. I can say yes—let's go back to work and we will pay the 40¢, let's arbitrate the days that we lose.

Q. Did the union arbitrate any of these strikes?

A. No, they did not.

Q. Now prior to 1950 were you able to get any of your cases before the Board and arbitrate them?

A. Yes.

Q. Prior to this time in question?

A. Several times. Most of the time they would eventually get a case before the arbitration board.

Q. After the time in question were you able to get any cases before the arbitration board?

A. No, sir. Did not ever get a case before the arbitration board in these three and a half years that are shown.

Q. And did the company attempt to do so?

108 A. Oh, yes.

Mr. Kramer: He has already testified about that.
By Mr. Winston:

Q. Now, during the periods you have in red were your mines closed down?

A. They were closed down.

Q. Just have a seat back there, sir.

A. (Witness resumes the witness stand.)

Q. What effect did these strikes have on your company's ability to pay the royalty under the contract?

Testimony of Guy B. Darst

A. It hurt our ability to pay the welfare.

Q. How did it hurt it?

A. Well, in each case, in each strike we were knocked out of increased tonnage at a lower cost.

Q. Now, during this period in question I will ask you whether or not the agents, the field representatives of District 28 with whom you dealt and who came down, either one or both of them, exercised any efforts to prevent through disciplinary measures the stoppage of work by strikes?

Mr. Kramer: We object because that is a conclusion. We have no objection to what they did or did not do, but this is a conclusion.

The Court: I sustain that objection. The witness may state any facts relative to that subject but the conclusion will have to be drawn by the jury.

109 Mr. Winston: Yes, sir.

By Mr. Winston:

Q. During the period of those strikes did Mr. Scroggs or Mr. Clark in your presence discipline the strike members?

A. No, not at any time.

Q. Mr. Darst, would you come down here again, please, sir?

A. (Witness complies with request of counsel.)

Q. I have just put up another chart. Did you prepare that?

A. I did.

Q. Now, the column on the left under the word "Strike," what does that indicate?

A. It lists the strikes and the dates of the strikes. These are also shown on this calendar.

Q. Take the first strike, April 14 and 17, 1950—

The Court: Are you referring to a paper, Mr. Winston; are you referring the witness to a paper on the board?

Mr. Winston: The chart on the board.

Mr. Kramer It has not been identified.

The Court: You had better identify it for the record, otherwise the record will appear blank on that.

By Mr. Winston:

Q. Did you prepare this chart of strikes?

110 A. I did prepare that chart.

Mr. Winston: We file this as Exhibit No. 8.

(Exhibit No. 8 was filed.)

By Mr. Winston:

Q. Taking the first horizontal column on the strike of April 14th and 17th, 1950, will you explain to the Court and jury what the following figures are and what they are based on and how you computed them?

A. All right. The first figure in the line is the actual cost per ton for the operation in April with the strike days, \$6.397.

Q. How was that arrived at?

A. Actual cost, all costs of operating into the cost figure.

Q. I mean, how did you get it, the tonnage?

A. From the tonnage? Well, that is the total cost divided by the total number of tons.

Q. Where did you get your cost figures?

A. Out of the books of the Benedict Coal Corporation.

The Court: How much is it per ton?

The Witness: \$6.397.

By Mr. Winston:

Q. Now, sir, the next figure. What does that indicate?

A. That is what the costs would have been if the production had not been lost on April 14th and 17th.

111 Q. That is the cost per ton?

A. Cost per ton.

Q. How did you get that, sir?

A. The average daily production for April was added in for the 14th and 17th and divided into certain fixed items of overhead. It made a difference of—

Testimony of Guy B. Darst

Mr. Kramer: Just a minute. We object to that because it is purely speculative.

The Court: Overruled. Go ahead.

By Mr. Winston:

Q. This item of overhead, what type of items were they?

Mr. Kramer: I want to be heard. There is nothing to identify items of overhead. He said he just put in items of overhead and they are not identified in any way, and a can can't just say—he can just take anything and put in overhead. There is no breakdown. It might be made competent but the shape that proof is in, I don't think a man can come in and give us his conclusions before a Court and jury as what includes overhead and say that is a correct figure. There is no proof to substantiate anything except the general conclusion.

The Court: He may state what his overhead is.

By Mr. Winston:

Q. Where did you get the overhead?

112 A. From the books of the Benedict Coal Corporation.

Q. What was the basis of it, explain it to the Court.

A. Of this \$6,397 there would be approximately a dollar or a dollar and a quarter of costs which is fixed overhead. It is made up of labor to maintain the coal mine, salaries, salaried overhead, depreciation, power, drainage, ventilation, safety, nightwatching—I may have left some items out but those are the items.

Q. Would those items you speak of, would they increase with two more day's production?

A. No; they would decrease.

Q. Would the total overhead increase or would it remain static if you had two more days production?

A. No, it would remain static and would stay the same.

Q. Then how do you get that second figure?

A. I added in two average days of production and.

Testimony of Guy B. Darst

divided it into the static overhead which reduced the overhead by 15.7 cents.

Q. Is that the overhead or the 15.7 cents?

A. That is the decrease that the additional tonnage would have given us in the overhead costs.

Q. Cost per what?

A. Per ton.

Q. What is your next figure?

Mr. Kramer: Your Honor, we object because he is
113 testifying on the basis of hearsay to what certain records are. I do not say he can't make compilations from records, but the records have to be introduced into the record that they may be available, and they have not been introduced. We object to the introduction of that chart.

The Court: Do you have the records present in Court?
By Mr. Winston:

Q. Do you have the records here?

A. I have summary operating statements in the courtroom and the complete set of records in my automobile. Maybe five or 600 pounds of bills and payrolls.

By the Court:

Q. What records do you have at present in Court?

A. The operating statements which are made up from the books, general ledger, and everything of the corporation which is in summary the activity by months of the corporation.

The Court: Now you make those available to Mr. Kramer?

Mr. Winston: Yes, sir. As I remember nearly a year ago we told them that they could inspect our records and books upon giving us notice. His pre-trial deposition.

The Court: Are those here this morning? Turn them over.

114 Mr. Winston: You have them, sir?

Mr. Milligan: If your Honor pleases, the witness

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has stated he has, well, a station wagon about full of them. We can have them all brought up here, but I would say these are the pertinent records.

By the Court:

Q. Those you have on the table there, do those summarize, put in compact form what is in the records that you have in your station wagon?

A. Yes, sir. Yes, your Honor.

Q. You make them available to the attorneys for the plaintiffs and the cross-defendants at this time?

A. I do.

The Court: All right. The objection is overruled.

Mr. Kramer: We want to ask—of course, you haven't them now, but we want to ask these records be available, and we have an opportunity to have them tonight, but we want the basic records on which they are based.

The Court: You are entitled to those.

Mr. Kramer: May I ask just one question of the witness, your Honor?

The Court: Yes.

By Mr. Kramer:

Q. Were these summaries prepared for this particular lawsuit?

A. No, sir.

Q. Are they regular company records kept all of the time?

A. They are regular company record kept all of the time.

Q. Not only for this period, but for all periods of operation?

A. Yes, sir.

Q. Substantially, I mean, throughout this area, not necessarily back to the beginning of the company.

A. That's right. I think we have them here from 1948 on.

Mr. Kramer: The records will be available to us tonight. Of course, we can't go over them now.

The Court: All right.

Testimony of Guy B. Darst

Mr. Winston: Go ahead.

The Court: Will you explain the meaning of the figures in the second column again. You may have done that, but because of the discussion I lost connection.

The Witness: The figure in the first column, if I may go back, is the actual cost per ton of coal as shown by the records of the company.

The Court: Yes, sir.

The Witness: The second column adds in the lost
116 tonnage for an average day, whatever the average was for the month shown, and the new figure for tonnage is divided into the overhead costs—the static overhead which goes on whether or not the mine operates or not. The difference is the loss, or this put another way, is how much less the coal mined would have cost multiplied by the total tonnage and extended over in dollars and cents. The difference is in per ton figures, individual ton, multiplied by the total tonnage and extended over gives the difference in cost caused by the loss of tonnage.

Mr. Kramer: I don't understand your total tonnage figure, what you mean by that, that you have in the fourth column.

The Witness: That is tons actually produced plus the average per work day lost.

By Mr. Winston:

Q. In other words, is that tons produced plus what you lost?

A. That's right.

Q. That is what you would have produced without the strike?

A. That is it.

Q. That is the difference in the cost with the strike and the cost per ton without the strike?

Mr. Kramer: I believe that is the total tonnage and
117 the figure you are pointing to isn't any different.

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Mr. Winston: That was a difference, and that was tonnage. If I pointed at the wrong one, I am sorry.

Mr. Kramer: What do you mean is different? Point to your figure.

The Witness: This 15 cents in the case of this first strike.

Mr. Kramer: That is what I thought. That was not what Mr. Winston pointed to.

Mr. Winston: I thought I hit that. If I hit something else, I am sorry. I was not watching my finger.

The Court: I wish, in the first column, Mr. Witness, for the benefit of the jury, that you take the first figure and state what it is, and the second figure and what it is, and the third figure what it is, the 15 cents, and the fourth figure, what it is, and the fifth figure, so the jury and Court can understand each figure, and do that with respect to all the columns.

The Witness: All strikes?

The Court: With your explanation of what they mean, the general meaning of the first column, you have explained that.

The Witness: You want me to go through one strike by the column?

118 The Court: Yes.

The Witness: I am listing in the first column the dates of the strike and the year. I am listing in the second column what the actual cost per ton of coal cost that particular month of the strike with the strike.

The Court: That is \$6.397.

The Witness: \$6.397 per ton actual cost.

The Court: All right.

The Witness: This next figure is \$6.24 which is what the cost would have been with two more days of production. The 15.7 cents is the difference between the \$6.397 and the \$6.24.

The Court: That is your loss, as I understand, as claimed by you.

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The Witness: That's right, sir. The 15.7 cents is then multiplied by the total tonnage, per ton figure 15.7 cents—

The Court: Total tonnage for what period?

The Witness: The strike month, the total tonnage produced with the two days lost tonnage. 23,044 tons multiplied out gives you the total cost of the strike, or \$3,617.90.

The Court: That is the damage you claim for the first strike in the year 1950?

The Witness: That is right, your Honor.

119 The Court: That is on what date in 1950?

The Witness: 14th and 17th of April. The same thing holds for the second strike, September—the water strike—the 27th, 28th and 29th. The cost was \$6.561. The cost without the strike would have been \$6.279, a difference of 28.2 cents, multiplied out by the tonnage actually produced and the tonnage lost of 14,465 tons makes a loss of \$4,975.18.

The Court: That is the second strike on what date in 1950?

The Witness: 27th, 28th and 29th of September.

The Court: 1950?

The Witness: Yes, sir.

The Court: All right.

The Witness: January 10th and 11th, 1951. Actual cost was \$5.824 per ton. If we had run January 10th and 11th the cost would have been \$5.643 per ton. A difference of 12.2 cents—correction—a difference of 18.1 cents per ton multiplied out by the total tonnage gives a loss—

By Mr. Winston:

Q. Total tonnage plus what?

A. Total tonnage which includes tonnage actually produced and tonnage lost on these two days gives a loss of \$4,238.24.

120 The next one, July 30th and 31st, 1951, actual cost was \$5.264; with the tonnage added lost in the two

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days strike, the tonnage added in would cost \$5.142 a ton, a difference of 12.2 cents, which multiplied by the tonnage actually produced plus the tonnage lost would have made \$1,648.95 for that particular strike.

The next strike was October 1 through the 8th, 1951. Actual costs with the strike going on was \$6.11 even. Adding in the lost production the cost would have been \$5.746, a difference of 36.4 cents, multiplied out by the total tonnage, makes a loss of \$6,651.01.

Mr. Kramer: How many days are you counting out there?

The Witness: I believe that is figured on five work days to my best knowledge, Mr. Kramer.

The Court: He said from October 1 through 8th.

Mr. Kramer: That is the reason I am asking how many days he is counting.

The Witness: I can look at it just a second, if you want me to.

The Court: You may look.

The Witness: Figured out for six working days, your Honor.

The Court: All right.

The Witness: The next strike was November 2nd and 7th, 1951. The actual cost produced—actual cost of tonnage produced \$5.729; adding in tonnage for the two lost working days the cost would have been \$5.507, making a difference of 22.2 cents per ton, multiplied by the total tonnage gives a loss of \$3,563.76.

The next strike, February—I have got it listed February 7th and 8th, 1952, actual cost was \$6.12 even; adding in the lost tonnage—

Mr. Kramer: May it please the Court, we object to this because the complaint says February 8th and that is not in accord with the complaint. Nothing in the complaint about the 7th—nothing in the record about the 7th. This is not in accord with the complaint or the previous proof.

Testimony of Guy B. Darst

Mr. Winston: You did have a——

The Witness: Half-day strike.

Mr. Kramer: It is not in the complaint, not a word said in the complaint about it.

Mr. Winston: Mr. Kramer is correct on that. At that time I guess I was not informed as to the 7th. We would like to amend the complaint so as to include the 7th.

Mr. Kramer: We object at this time because we are not here prepared to meet it. They have had this ready before the trial and no effort made to amend the complaint
122 before they started.

The Court: Overruled. Let the amendment be made.

The Witness: February 7th and 8th, 1952, cost would have been \$6.008—six dollars even and 8/10ths cents—making a difference of 12.2 cents, which multiplied by the total tonnage gives a loss of \$2,151.47.

The next one, April 24th and 25th, 1952. Actual cost was \$6.083 per ton; adding in the lost tonnage the cost would have been \$5.954, making a difference of 12.9 cents, which multiplied by the total tonnage makes a loss of——

By Mr. Winston:

Q. Explain your total tonnage.

A. Total tonnage is the tonnage actually produced plus average production of these two days. Making a loss of \$2,405.66.

Q. Coming back—I will come back to this.

A. Then on the next strike, August 5th and 6th, 1952, we have an actual cost of \$5.907; figuring in the average tonnage for two lost days the cost would have been \$5.721, making a difference of 18.6 cents, which multiplied by the tonnage lost plus the tonnage actually produced makes a loss of \$1,798.25.

October 16th to the 28th, 1952. Actual cost was
123 \$6.581 and the lost tonnage average figured in for each lost working day, the cost would have been

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\$5.855, a difference of 72.6 cents multiplied by the total tonnage, tonnage actually produced plus tonnage for each of the working days lost, would make a loss of \$11,306.65.

The next one, May 18th through the 27th, actual cost was \$7.503; adding in the lost tonnage and figuring the cost the cost would have been \$6.679, a difference of 82.4 cents.

Mr. Kramer: Now, your Honor, we are going to object to that for the additional reason, if your Honor recalls the proof yesterday was that the men offered to come back to work on the 20th—the 19th, the meeting was the 18th, after two days at least, whatever those days may have been, and they put up a sign they weren't going to operate; therefore we could not be chargeable with the entire period if chargeable with anything.

The Court: Overruled. You are talking about May, 1953?

The Witness: Yes, sir, your Honor.

The Court: You better put in the date, May 18th through May 27th.

The Witness: 1953.

Mr. Winston: Put that on with a blue pencil, sir.

The Court: What is the claimed damage for the 124 May 18th through May 27th, 1953, period?

The Witness: Multiplied out by the total tonnage makes a loss of \$8,393.26.

By Mr. Winston:

Q. Coming back to the item that you testified about you have denominated here as "Other losses due to abandonment of construction work," what strike was that item?

A. That refers to the abandonment of the construction work started by Mr. Campbell.

Q. What was that figure and what was it based on?

Mr. Kramer: We object to that figure, your Honor, him stating what it is based on, until we have an opportunity to see what it is based on.

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The Court: Yes.

A. Figure is based on labor and materials used in the construction project.

Q. Who was that paid to or paid by?

A. That was paid by the Benedict Coal Corporation to Mr. Campbell and to suppliers of material.

The Court: All right, you may answer.

Mr. Kramer: We object to that because materials were not—he says part of it was paid to Mr. Campbell, that is correct, for payment, I assume, of labor employed by Mr. Campbell, and for materials, and that could not possibly be a measure of damages under any rule of law we
125 know and that would not be any way to measure any loss that may have been incurred there.

The Court: Overruled.

By Mr. Winston:

Q. Go ahead. What was that figure?

A. The figure was \$21,534.85.

Q. Coming to the bottom, you have "Other losses, business profit, and so forth," what strike does that refer to?

A. That refers to the May 18th and 27th strike, 1953.

Q. Do you have your breakdown, sir?

A. We do.

The Court: I didn't get your last question.

The Witness: I didn't read the amount, sir. The other losses listed under the May 18th strike, 1953.

Mr. Kramer: We object to that total, your Honor. Been no proof what it consists of.

By Mr. Winston:

Q. Do you have your breakdown, sir?

A. Yes.

The Court: Is he about to talk about the strike beginning May 18, 1953, and ending May 28, 1953?

Mr. Winston: May 27th—yes, sir.

The Court: I thought he gave the figures of claimed damages as being \$8,393.26.

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126 Mr. Winston: Yes, sir, but he also has listed additional losses as to that particular strike.

The Witness: Just read the figure.

The Court: You previously testified something about that. Before you read the figure, I don't understand that matter.

By Mr. Winston:

Q. What were your additional losses, tell the Court and jury that.

A. The Benedict Coal Company was processing coal from the Big Mountain Coal Company, the stripping contractor, Benedict's profit was 25 cents per ton. Projecting the tonnage that was lost through this strike——

Q. What tonnage was lost at Big Mountain through this strike?

A. Approximately 1,100 tons a day.

Q. What do you base that on?

Mr. Kramer: Is that your loss or Big Mountain's loss?

The Witness: Benedict's loss.

Mr. Kramer: Eleven hundred tons per day.

By Mr. Winston:

Q. Whose production loss was that?

A. That is Big Mountain's production.

Mr. Kramer: I am objecting to that because he is
127 testifying as to hearsay records in some other company, and I do not think it is competent in any shape.

The Court: Objection overruled. Go ahead, you may answer.

The Witness: Benedict's profit from the processing of coal of the Big Mountain Coal Company was 25 cents a ton. We are listing that to make up this figure here, of \$2,250.00.

By the Court:

Q. Where did you get your 1,100 tons per day from Big Mountain? How do you get that figure?

Testimony of Guy B. Darst

A. Approximate average production.

Q. Over what period of time did you base that average?

A. Well, they just began to produce coal in May and was aiming for production at 1,500 tons a day.

Q. But how many days did you use to reach that average? How many days did he produce, if he did produce, an average of 1,100 tons per day for Benedict?

A. He was working one shift and producing between 750 and 800 tons on the one shift. He was figuring to put on the second shift production at the time of this strike, and we estimated that 1,100 tons could have been produced and sold.

Q. What do you base that estimate on? The difference between the 750 and the 1,100—what is your basis for reaching the 1,100 figure?

128 A. Two-shift operation, your Honor. It is customary to operate expensive machinery two shifts in order to get the full benefit of the machinery.

The Court: Overruled.

Mr. Kramer: May I state this, so I may have benefit of the record.

This man, of course, had nothing to do with that operation. He has some figures here. I do not know what he is basing it on, whether what somebody told him or hearsay or not. He is not basing it on Benedict Company records.

We do not think one concern can go out and accumulate figures from another and use it as basic proof in a case of this type without showing that proof. We have no way to get at it, and we respectfully submit it is incompetent.

The Court: Overrule the objection.

By Mr. Winston:

Q. What was your loss on that item, sir?

A. \$2,250.00.

Q. Now, sir, during that period was Benedict purchasing coal from others?

Testimony of Guy B. Darst

A. Yes. Benedict was purchasing coal of the same type and grade and processing through its own tippie from other small coal mines, the coal being trucked into 129 the Benedict tippie.

Q. What profit per ton was Benedict making?

Mr. Kramer: I object to that. I don't see how that is competent. That wasn't shut down by this.

By Mr. Winston:

Q. What effect did this shutdown have on those purchases?

A. We could not purchase the coal and process it because the Benedict tippie was not working. The men operating the tippie were on strike. That could not be continued.

Q. Were those men members of the United Mine Workers that operated your tippie?

A. They were.

Q. What profit per ton did you make off the coal that you purchased and ran over your tippie?

A. 53.3 cents per ton.

Q. How much tonnage were you prevented from purchasing?

A. Twenty-five hundred tons. And extending the 2,500 tons at a profit of 53.3 cents would have made a loss of \$1,382.50.

By the Court:

Q. Twenty-five hundred tons per what, day, week?

A. That is for the period of eight working days, May 18th through the 27th.

Q. May 18 through May 27, 1953?

130 A. Yes, sir.

Q. What is that figure, 53.3?

A. Twenty-five hundred tons at 53.3 cents per ton, \$1,382.50.

Testimony of Guy B. Darst

By Mr. Winston:

Q. What is the total of those two figures, sir? Will you add that up? Of those two items of loss.

A. Total of those two figures is \$3,632.50.

The Court: How much?

The Witness: \$3,632.50.

By Mr. Winston:

Q. Now, sir, do you claim any other losses?

A. Yes, we do.

Q. What is that?

A. Normally large coal buyers who buy steam coal buy their coal in the last half of the preceding month for the following month. We are claiming that Benedict did not get the benefit of 7,000 tons of production from the Big Mountain Coal Company in June, the following month, because we were on strike in late May and could not sell the coal.

The Court: In June, 1953?

The Witness: Yes, sir. On the 7,000 tons—

Mr. Kramer: Just a moment. Your Honor, we object to that. Here is the situation of this proof on that item.

131 Now it was customary to place orders by coal buyers during the latter part of a month for business during the following month, to be delivered during the following month.

He is speculating on how much he could get. He has not shown any order, that anybody was willing to make it available or buy the coal. There is no definiteness to it. He hasn't given any proof to this time of any definiteness. All he is saying is he could have gotten that many orders without any proof, and we object to it.

The Court: Lay the foundation a little. I sustain the objection.

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By Mr. Winston:

Q. Let's see, Mr. Darst. Take the figure without this last, write that over there, will you. Substitute for that \$5,382.50 the total you had.

Mr. Kramer: You are asking him to substitute the total of those figures?

The Court: Mr. Winston, if he is laying the foundation, if he shows that he had customers who would have purchased that coal, in the opinion of the Court that would take it out of the realm of speculation and guesswork, and his answer would be competent.

But the objection was sustained because the question calls for an answer that was too indefinite and was
132 in an area of speculation and guesswork. That is the basis of the Court's ruling.

Mr. Winston: Your Honor, I do not want to claim something that I do not think is right. I would like to check on that and see if I can substantiate that. That is the reason I would like to leave that open.

The Court: You may do so.

Mr. Winston: But I do want to have put in pencil the figure that we have.

The Court: Well, you may do so.

Mr. Kramer: What figure, may I ask for information, are you putting in in pencil?

The Witness: That was a total of \$1,382.00 and the \$2,250.00.

Mr. Kramer: Based on the 1,100 tons and the 2,500?

The Witness: That is correct, making a total of \$3,632.50, which is the pencilled figure.

The Court: Do I understand correctly that the thirty-six hundred and some odd dollars is out of it for the present time until you check your records?

Mr. Winston: What we are claiming for the present time; yes, sir.

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Mr. Kramer: Just a minute. I think he misunderstood him.

He has the item of some \$5,000, the last figure
133 here, and he is trying to explain, or he is saying he is taking out of that \$5,000 figure a certain amount and leaving a total of \$3,532.50.

I do not want the Court to be confused.

The Court: He is leaving \$3,632.50 in?

Mr. Winston: As one item, and I think it is \$1,750.00 that the Court made your ruling on.

Mr. Kramer: I made an objection to it. I think your Honor was confused on that.

The Court: All right.

The Witness (Witness marks exhibit) May I elaborate?

The Court: Yes, sir.

The Witness: In May of 1950 we had an order with the Duke Power Company for 5,000 tons of coal. That order was sold and taken in the last half of April. We shipped approximately 40 percent of that order, leaving 60 percent unfilled. Had we been permitted to run the rest of the month we would have filled that order to the Duke Power Company.

The Court: I hold that answer is competent, and I hold that any alleged damage sustained by reason of that is competent.

The Witness: We are claiming that the order we would have gotten for June, taken in late May, would have
134 amounted to 7,000 tons, and the loss to Benedict—

Mr. Kramer: That is what I am objecting to. I did not object to the earlier part. I am objecting to any prospective purchase he might have received the last part of May for fulfillment in June.

The mere fact he had a past order the month before does not make it competent for the succeeding month. That is the thing I am objecting to. He has not stated he had any order for anything of that kind.

Testimony of Guy B. Darst

The part your Honor understood he testified that he got in April to deliver in May, has been included in those other figures, that 5,000 tons and we are not talking about that.

The Witness: No, sir.

Mr. Kramer: We are talking about his guess of how much he would have gotten the latter part of May for delivery in June and for which there is no substantiation and we are objecting to that.

The Court: I am inclined to think the objection is good unless something in addition may be shown.

Mr. Winston: We will reserve that point at this time.

The Court: What is the total of your figures on the board with those figures out which have been eliminated?

135 By Mr. Winston:

Q. Do you have an adding machine total of those figures?

A. I do.

The Court: First, let's let the jury know and the Court know what figures are out of the figure that are on your last exhibit there, Exhibit No. 8.

Mr. Winston: This figure is out, sir, \$5,382.50, and instead, we have a new figure of \$3,632.50.

The Court: The last figure on Exhibit No. 8 of—

Mr. Winston: \$5,382.50, that is out, and instead—

The Court: — out for the present and instead a figure of—

Mr. Winston: \$3,632.50 instead.

The Court: All right.

The Witness: One minute while I take the \$1,750.00 out of my adding machine total. Does the Court want me to add, to change the total down here minus this figure?

The Court: Yes, for the benefit of the jury. What is the figure?

The Witness: The figure is \$75,017.60.

(Whereupon, the witness resumed the witness stand.)

Mr. Milligan: Will your Honor indulge us just a moment?

136 The Court: Yes, sir:

By Mr. Winston:

Q. Mr. Darst, would you come down here, sir.

A. (Witness complies with request of counsel.)

Q. Mr. Darst, from your testimony you have spoken of the union, of the mine workers and also certain arbitration matters. For the benefit of the jury and the Court, first I want you to show how the union is composed. Who is the head of the United Mine Workers of America?

A. John L. Lewis.

Q. And what is that union, what is the name of that union?

A. United Mine Workers of America, International.

Q. Will you write that up there, sir, United Mine Workers of America.

Mr. Kramer: Just a moment. Your Honor, we object to that kind of demonstration because it cannot be made a part of the record in the case unless something more is done, therefore, it is incompetent at this time.

The Court: What is the purpose of that testimony?

Mr. Winston: To show the breakdown of the union.

The Court: Overrule the objection. That testimony is for the convenience of the jury and is admitted for that purpose only.

Mr. Kramer: Then, your Honor, I ask that counsel
137 be required to reproduce it on a sheet of paper so it may be filed, in duplication, so we are entitled to have it as a part of the record, and, of course, it will be filed as an exhibit.

The Court: All right.

The Witness: (Complying with request of counsel.)

By Mr. Winston:

Q. Now, how is the United Mine Workers of America divided?

Testimony of Guy B. Darst

A. Divided into districts. The District the Benedict Coal Corporation is located in encompasses the South-western area of Virginia and is called District No. 28. A similar line (drawing on board) would go to other districts, District No. 19, District No. 29, and so forth.

Q. Let's put it out on the side, who was president of the District during the period in controversy?

A. Mr. Allen Condra.

Q. Put that out on the side.

A. (Witness complies with request of counsel.)

Q. Did they have any other officers or agents with whom you dealt during the period in controversy?

A. Yes. The District in the field was represented by, I believe their title is District Representative or Field Representative. There will be several.

Q. Who were the ones of the field representatives
138 about whom you have testified?

A. (Witness marks on board.)

Q. Was there another one?

A. There was another one, M. W. Clark, I believe is his initials.

Q. What was he known as?

A. He was known as Bud Clark.

Q. By whom are those field representatives employed?

A. Those field representatives are employed by the District.

Q. How is the District divided as to membership?

A. The District is divided into local unions.

Q. Let's make that from the District, I believe, sir.

A. (Witness marks on board.)

Q. And what local was Benedict concerned with?

A. Local Union No. 6372.

Q. Put that on there, sir.

A. (Witness complies with request of counsel.)

Q. Who was the president of the local during the time in question?

A. Ellis Lynn.

Q. Put his name on the right, sir.

A. (Witness complies with request of counsel.)

I believe a little later and perhaps at the end of the time in question, it was Dana Muncey.

139 Q. Put to the side to indicate their office.

A. (Witness complies with request of counsel.)

Q. Now, sir, did the District have any other officers—correction. Did the local have any other officers or members with whom you have dealt as stated in your testimony?

A. Yes.

Q. What were they?

A. Generally the committee of three, what we call the mine committee.

Q. Put that below there and who the mine committee was as you have testified.

A. (Witness complies with request of counsel.)

Q. Tell who they are so the record will show.

A. The mine committee that we dealt with principally were Grant Mullins, James Scott, Fred Tyler, which was the No. 5 mine committee at the time of this litigation.

Q. All right. Now we have also spoken about the methods of settlement of disputes under the contract. I hand you the 1950 contract, being the first one covering that, and ask you to refer to the section—I think the contract has already been introduced—"Settlement of Local and District Disputes."

The Court: As I understand it, at the request of Mr. Kramer you are filing as Exhibit No. 9 a copy of the graph which was placed on the blackboard by the
140 witness in the presence of the jury?

Mr. Kramer: That is correct, sir.

The Court: Let that be done.

(Exhibit No. 9 was filed.)

(The witness returned to the witness stand.)

By Mr. Winston:

Q. What is the first step of the adjustment of disputes as provided for in that contract?

A. The contract says, "Should differences——"

Mr. Kramer: What page or section or heading?

The Witness: It is page 7, the section entitled, "Settlement of Local and District Disputes."

A. (Continuing) "Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:"

"1. Between the aggrieved party and the mine management."

Q. As to the first, the aggrieved party, you have testified about various of the strikes, which party would that be referring to?

Mr. Kramer: We object to that. I think that is
141 a conclusion.

Mr. Winston: I will retract that, sir.

By Mr. Winston:

Q. Go to the second.

A. Number 2. "Through the management of the mine and the Mine Committee."

Q. Who was the management of the mine in your case?

A. The superintendent and myself.

Q. Who was the mine committee during that period of time?

A. The mine committee was composed of three members, Grant Mullins, Jim Scott and Fred Tyler.

Q. Now, sir, what was the third step.

A. "Through District representatives of the United Mine Workers of America——"

Q. Correction. Were the first and second steps followed in these disputes you have testified about?

A. No, they were not.

Q. Well, I believe in these disputes on occasion you did see the aggrieved party, didn't you, sir?

A. After the strike was called in most instances.

Q. That was after the strike was called?

A. That is correct.

Q. Now on the second thing, the second step, was that followed on these occasions before or after the
142 strike was called?

A. After the strike was called there would generally be a meeting between the mine management and the mine committee.

Q. The third step, will you read that, sir?

A. No. 3. "Through District representatives of the United Mine Workers of America and a commissioner representative, where employed, of the coal company."

Q. Did you have a commissioner representative?

A. No, we did not. We were not that large a company.

Q. Who dealt with them?

A. The superintendent and myself.

Q. When you reached that stage—correction. During any of these disputes did you confer with the District representative?

A. Yes, sir.

Q. What was the fourth step?

A. "By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators."

Q. During the strikes which you have testified about, did you ever reach the fourth step?

A. We never reached the fourth step.

Q. Was the union willing to take the fourth step?

A. They were not willing to take the fourth step.

Q. What was the fifth step, sir?

143 A. No. 5. "Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers."

Q. The other page, I believe, concerns that step, sir.

A. "A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

Q. Was the fifth step ever taken?

A. The fifth step was never taken.

Mr. Winston: I believe you may cross-examine.

Mr. Kramer: Your Honor, could we have about a 10 or 15 minute recess at this time before cross-examination?

The Court: Yes, sir. Take a recess.

144 (A short recess was had.)

The Court: Gentlemen, you may proceed with the witness.

Cross-Examination, by Mr. Kramer.

Q. Mr. Darst, here yesterday you filed as Exhibit No. 3 a copy of the National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952, and I hand you that exhibit.

I read from the first paragraph thereof:

"Whereas on January 18, 1951, and at various dates subsequent thereto, certain coal associations, companies

and individuals (generally referred to as 'Operators'), in their association, company and individual names and capacities, executed with the United Mine Workers of America an Agreement denominated 'National Bituminous Coal Wage Agreement of 1950 as Amended January 18th, 1951'.

I go from the printed document now.

You have filed also as Exhibit No. 2 the National Bituminous Coal Wage Agreement of 1950, and you have not filed the second paper referred to there as amended January 18, 1951.

I hand you here a copy of that document and ask you if that is the document and will you file it as Exhibit 145 No. 10?

Mr. Winston: May we see a copy of it?

Mr. Kramer: These are the ones we submitted to you and asked for a stipulation. You did not stipulate on them.

The Witness: I beg your pardon?

By Mr. Kramer:

Q. That is the 1951 paper?

A. Yes.

Mr. Kramer: Then we ask to file it as Exhibit No. 10.

(Exhibit No. 10 was filed)

By Mr. Kramer:

Q. I notice following and going back to the document filed as Exhibit No. 3, which is the 1952 amendment to the National Bituminous Coal Wage Agreement, the paper further states in the first paragraph thereof:

"... as Amended January 18th, 1951"; and said Operators, signatory to this Agreement, have now negotiated with the United Mine Workers of America certain additional amendments to said 'National Bituminous Coal Wage Agreement of 1950' and it is the agreement and intent of all parties hereto to amend, and as amended,

carry forward and preserve the terms and conditions of said National Bituminous Coal Wage Agreement of 146 1950 and all previous Agreements as therein provided."

"That closes the first paragraph of Exhibit No. 3.

I hand you the previous agreement referred to therein, the National Bituminous Coal Wage Agreement, effective April 1, 1945, executed in the City of Washington, D. C., April 11, 1945, and ask you if that is one of the previous agreements?

A. As far as I know it is. I was not engaged in operation of the coal mine at that date.

Q. But it is recognized as one of the previous agreements in the group, is it not?

A. Yes.

Mr. Kramer: And I ask to file it as Exhibit No. 11, and pass a copy to the Court.

(Exhibit No. 11 was filed.)

Mr. Milligan: If your Honor please, I understood the witness to state he was not operating the mine in 1945 and that he was not familiar with that 1945 document which is submitted.

Mr. Kramer: All right. I refer your Honor to Exhibit No. 2 which the witness filed and which recites specifically the instrument that I am asking him to file, and if you will turn to that you will find he was operating in 1950 and it specifically refers to the instrument I have handed to the witness.

147 The Court: 1950 agreement, at what page?

Mr. Kramer: Page 1, first paragraph.

Mr. Milligan: If your Honor please, that still does not say that the witness can identify it, and if he can't identify it he simply can't identify it and that is all. That is my position.

Mr. Kramer: Well, here is what this instrument refers

to, your Honor. I am referring to Exhibit No. 2, there in that first paragraph about the middle, you will find this: "This Agreement (subject to the amendments, modifications and supplements as hereinafter provided, carries forward and preserves the terms and conditions of the Appalachian Joint Wage Agreement (dated June 19, 1941) effective April 1, 1941—"

The Court: Which paragraph are you reading from of the 1950 Agreement?

Mr. Kramer: The first paragraph about the middle, your Honor. "This agreement —"

The Court: Yes, I see.

Mr. Kramer: "This Agreement (subject to the amendments, modifications and supplements as hereinafter provided) carries forward and preserves the terms and conditions of the Appalachian Joint Wage Agreement (dated June 19, 1941) effective April 1, 1941, to March 31, 1943,

the Supplemental Six Day Work Week Agreement, 148 the National Bituminous Coal Wage Agreement (dated April 11, 1945) effective April 1, 1945, and all the various District Agreements executed between the United Mine Workers of America and the various Operators and Coal Associations (based upon the aforesaid basic agreements) as they existed on March 31, 1946, subject to the terms and conditions of this Agreement and as amended, modified and supplemented by this Agreement as herein set out."

I am trying to put the entire Agreement in.

Mr. Milligan: Our position on it is this: We are not challenging the exhibit which we introduced. We are saying, if I understood the witness correctly, he was not familiar with the document. They have representatives of the United Mine Workers here that can introduce the whole document. We don't have to vouch for all these documents, that we know nothing about, and if he is not familiar with

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it I think it cannot be introduced by him. If he is familiar with it then I have nothing further to say.

Mr. Kramer: Of course, your Honor, he was operating under it because this contract in 1950 says he is operating under it, and he has shown he was operating under the 1950 Agreement. The 1950 Agreement is not just the printed paper introduced yesterday as Exhibit No. 2, 149 but it is plus these others, and I want to show the entire contract that he was operating under.

The Court: Mr. Milligan, do you question the authenticity of this instrument?

Mr. Milligan: We just don't know. If we don't know I don't think we should be called on to tell something we don't know.

We are not trying to tell something we don't know. He has representatives here. He has Mr. Boyle, who is a representative of the International, and various other people, that doubtless are familiar with it, but if Mr. Darst is familiar with it I think he should, and will certainly say so, but if he is not I think he should be accorded the privilege of saying he does not know what it is.

By the Court:

Q. The last paper which Mr. Kramer handed to you, as I understand it is the 1945 Bituminous Coal Wage Agreement which was between the United Mine Workers and the Coal Operators, an Association signatory thereto—

A. Your Honor, I believe I can help—

Q. What I was about to ask you is whether or not you question that being the real 1945 Agreement?

A. No, I do not question that.

The Court: The objection is overruled.

150 Mr. Kramer: That should be filed as Exhibit No. 11, your Honor.

(Exhibit No. 11 was filed.)

The Court: You may make any explanation you desire to make relating to this.

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The Witness: I did not want to be unfair. I didn't know what we were operating under. When we had a problem come up, the contracts had all been printed and carried forward as Mr. Kramer states, the pertinent provisions of them, and we operated under the provisions that pertained to our particular coal mine, and we had the contract and operated under it, but as for being familiar with the entire contract I could not state that I am as pertained to Benedict.

By Mr. Kramer:

Q. The next reference in this Exhibit No. 2, the Agreement of 1950—

Mr. Milligan: Just a minute. May I interrupt. In view of that statement, does your Honor then, so to speak, qualify him to identify that instrument?

The Court: Well, I think he sufficiently qualified himself to let the instrument go into the record with his explanation; yes, sir.

By Mr. Kramer:

Q. Going back, the next instrument referred to in 151 the Exhibit No. 2, which was the Agreement of 1950, I believe is the six-day week Agreement—Six-Day Work Week Agreement, is the correct language.

I hand you copies of that instrument and ask you if that is the paper referred to therein?

Mr. Kramer: Mr. Rayson will hand opposing counsel a copy.

The Court: Is that March 1, 1946?

Mr. Kramer: No, this is December 17, 1943.

The Court: I do not see that mentioned in the first paragraph of the 1950 Agreement, is it?

Mr. Kramer: Your Honor will notice that it says "The Supplemental Six-Day Work Agreement." There is no date to it. Your Honor notices that language?

The Court: Yes.

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Mr. Kramer: That is what I am talking about. There is no date specified.

I will ask him to file that as Exhibit No. 12.

(Exhibit No. 12 was filed.)

Mr. Kramer: As a matter of fact, it is dated December 17, 1943.

I notice there is referred to, I believe it is next—I am trying to keep them in order—the Appalachian Joint Wage Agreement dated June 19, 1941.

Does your Honor find that reference there?

152 The Court: Yes, sir.

Mr. Kramer: We will file that as Exhibit No. 13.

(Exhibit No. 13 was filed.)

The Court: Mr. Kramer, I understand some of these previous agreements, or some of the provisions of these previous agreements, were eliminated.

Mr. Kramer: Yes, your Honor.

The Court: If any point or any issue is joined on any provision or any of these contracts, then I think you should let the jury know what language has been eliminated in any of the previous agreements by any of the supplemental agreements.

Mr. Kramer: We do expect at the proper time—he is not going to be asked to testify on cross-examination to these, but there will be developed in our proof wherein those still remain in effect and certain regions have been eliminated, but he is not too familiar with them because it would be probably unfair to him, but I will do that in the course of our testimony.

There is also referred to in this instrument of 1950, Exhibit No. 2, what is known as the Southern Wage Agreement. Unfortunately, we seem to be able to find this morning only one copy of that.

The Court: What is the date of it, Mr. Kramer?

Mr. Kramer: Executed July 5, 1941, effective April
153 1, 1941, to March 31, 1943.

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We will file this as Exhibit No. 14.

Mr. Milligan: We want to make the same exception on all these documents.

*The Court: The same ruling. Mr. Milligan, if you question the validity of any of these documents, or the accuracy of any of them, then of course I will hear you about that.

Mr. Milligan: My position is, Mr. Darst is not familiar with them and we can't say whether they are authentic or what they are.

The Court: Well, the Court will grant the defendant the privilege to raise the question of the validity to any one of the instruments and will reserve the ruling at this time on that question if and when it arises.

Mr. Milligan: Yes, sir.

(Exhibit No. 14 was filed.)

By Mr. Kramer:

Q. When did Benedict Coal Corporation begin operation?

A. Operation was started in 1917.

Q. In the name of Benedict Coal Corporation?

A. Under the name of Benedict Coal Corporation.

Q. And it was on this same operation during this time, and as I understood you weren't of course, connected with it back at that time?

A. No, sir.

154 Q. You were a little too young.

A. A little too young, yes.

Q. Your father was operating it at that time?

A. No.

Q. Did you have stock ownership?

A. It was a stock ownership of the company. In 1925 the present ownership took over.

Q. Then changes in management and changes in stockholders but it is the same corporation?

A. Very little.

Q. When did you begin to work with it?

A. I first worked at Benedict in 1933 and 1935 for—I might explain, summers on the engineering force and in 1936 after I graduated from school.

Q. When did you become active in the management of it?

A. 1946, after the war.

Q. What was your title in 1947, 1948, and 1949?

A. Vice-President and general manager.

Q. Then you were general manager during the year 1948?

A. That is correct.

Mr. Kramer: And I want to file also as Exhibit No. 15 the National Bituminous Coal Wage Agreement of 1948.
By Mr. Kramer:

Q. This one is executed in Washington, D. C., June 25, 1948?

155 A. Correct.

(Exhibit No. 15 was filed.)

Mr. Kramer: My attention is called to the fact there is bound in that pamphlet, your Honor, two agreements.

The second page of the agreement I have just filed, your Honor, shows it is the National Bituminous Coal Wage Agreement of 1947.

The Witness: That is right.

Mr. Kramer: So that both 1947 and 1948 are in this one instrument. That is this one, which is Exhibit No. 15. If your Honor will notice the second page of Exhibit No. 15, the first page, it contains the 1947 Agreement. So that Exhibit No. 15 contains both the 1948 and the 1947 agreements.

By Mr. Kramer:

Q. Now will you take the Exhibit No. 2, which is the 1950 Agreement.

A. I have No. 3.

Q. Exhibit No. 2, which is the National Bituminous Coal Wage Agreement of 1950, and I will ask you to turn to page 8 thereof and read to the Court and jury the language under the heading "Miscellaneous."

A. "1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or 156 the National Bituminous Coal Wage Agreement of April 11, 1945, containing any 'no strike' or 'Penalty' clause or clauses or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void.

"2. Any and all provisions of any contracts or agreements between the parties hereto or some of them whether National, District, Local or otherwise providing for a protective wage clause and a modification of this Agreement or said agreements if a more favorable wage agreement is entered into by the United Mine Workers of America, are hereby rescinded, cancelled, abrogated and made null and void."

Mr. Kramer: That is as far as we need to go at the moment, the first two sections of that.

The Witness: Your Honor—

The Court: Yes.

The Witness: —I would like to read the rest of that.

Mr. Kramer: Well, if your counsel cares to ask for those they may do so. I am not asking you for it at this time. I think I have the right to direct my own questions.

The Court: That is right, but if you desire to read the rest of it you may do so.

157 The Witness: "3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery

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provided in the 'Settlement of Local and District Disputes' section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry.

"4. The United Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement."

By Mr. Kramer:

Q. Was there any difference in the type of printing, any italics, any heavy black type, in those last two clauses?

A. I wanted to emphasize——

Q. That is not the question. I want an answer.

A. No difference.

Q. But I noticed you read it vastly differently?

A. That is correct.

158 Q. Inasmuch as you wanted to read that, I will ask you to take the 1952 agreement and take "Miscellaneous" and see what happens to that best efforts clause you are talking about. Do you have the 1952 Agreement there?

A. I think I do.

Q. All right, read what is under "Miscellaneous" there, and read it with just as much emphasis as you care to, and note the difference as we go along.

A. Shall I read it with emphasis?

Q. Read No. 3.

"Amend 'Miscellaneous' by striking out subsection 4 and amending subsection 3 to read as follows:

"3. The United Mine Workers of America and the operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims

which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Local and District Disputes" section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts."

159 Q. "Collective bargaining without recourse to the courts." Now read No. 4, which is the one you read with such emphasis in the 1950 amendment with reference to the best efforts clause, and read that and see if the words "Best efforts" are in it.

A. Which one now, Mr. Kramer? Excuse me.

Q. 1952.

A. The one I just read a while ago?

Q. You read No. 3 from that. You did not read No. 4. I believe.

A. "The United Mine Workers of America——" Is this 1952?

Q. You are not reading under "Miscellaneous".

A. Paragraph 4?

Q. Yes, where it starts right where you quit reading a moment ago, where it says, "Amend".

A. Oh, you mean over here.

Q. Yes.

A. Excuse me. I did not read 4 a while ago, did I?

Q. No, you did not.

A. Don't think I ought to read No. 4.

Q. You read No. 4 of the other, the best efforts clause, with a great deal of emphasis. Read what it says about No. 4 in 1952.

A. "Each operator ——"

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160 Q. "Amend —"

A. "Amend 'Miscellaneous' " —

Q. By what?

A. I was just trying to get in my own mind what they done.

"Amend 'Miscellaneous' by adding thereto the following, to become subsection 4:"

Q. Takes the place of the other.

A. "Each operator signatory or who may become signatory hereto hereafter agrees to give proper notice to the President of the local union at the mine by the 18th day of each month that said Operator has made the required payment to the United Mine Workers of America Welfare and Retirement Fund for the previous month."

Q. So that No. 4 as you read earlier from the 1950 Agreement was eliminated entirely and this language was substituted for it?

A. According to these documents, yes.

Q. Now, you were a member, your company was a member of the Virginia Coal Operators Association during what period?

A. From the beginning of the litigation —

Q. From what date to what date? You spoke yesterday about withdrawing.

A. From the time the Virginia Coal Operators Association was formed —

161 Q. When was that, do you remember?

A. I do not remember. It was in the 1920s, I believe.

Q. When was it you said you withdrew?

A. In late 1952. I believe October, sir.

Q. Are you a member of that association now?

A. No, we are not.

The Court: What is the name of that association?

Mr. Kramer: Virginia Coal Operators Association, your Honor, who are parties to this Agreement.

By Mr. Kramer:

Q. You spoke yesterday of making or writing a letter to the International Union about a certain work stoppage that occurred, and you filed as an exhibit a letter dated May 20, 1953, which was written after the last of the work stoppages or strikes, if you want to call them, that you complain of in this lawsuit.

Have you another letter you wrote earlier or copies of them?

A. I don't have them now; no, sir.

Q. You don't have any here now except this one, and this one was written May 20, 1953, which was after the last one of which you make complaint in this litigation?

A. That is correct.

Q. Or during the period after the strike started, rather?

A. Yes.

162 Q. I notice that the last paragraph of that letter states this: "We are writing to advise that we intend to hold your union responsible for the damages which your members are causing us through this illegal work stoppage."

You are not referring to any other claimed illegal work stoppage?

A. That is correct.

Q. And yet you claim that there had been a number of other illegal work stoppages prior to that time.

A. Yes, that is correct.

Q. Let's go back to what you say was the first one, the first one you complain of in this litigation. You say that was one that occurred on April 14 and 17, 1950?

A. That is correct.

Q. And which you say arose over what?

A. Replacement of men laid off in a coal mine that was working out and had extra men.

Q. You had known for some time that you were going to

have to close, or were going to close the mine up on top of the mountain, Nos. 11 and 12, didn't you?

A. Nos. 11 and 7.

Q. 11 and 7. And you were also aware you were going to operate or open up two additional seams lower down on the mountainside?

A. That is correct. We tried to develop those mines 163 during the three days—we worked three days a week, which was 1949, which hampered their development considerably.

Q. How many different openings were operated during the year 1950 prior to this April date—you had opened what seam?

A. Nos. 11 and 7 were working out; No. 9 and No. 10 seams had been opened up. Some time prior to—

Q. And you operated then the whole four seams, Nos. 7, 9, 10 and 11, just as one unit through one tippie?

A. That is correct. The seams with the quality were mixed. Nos. 9 and 11 were mixed and Nos. 10 and 7 were mixed, and the two grades of the two seams of coal have different qualities and are sold on different markets and completely apart.

Q. You operated two tipples?

A. That is correct.

Q. One carried two seams of coal and the other one took care of the other two seams?

A. That is right.

Q. They operated under one payroll?

A. That is correct.

Q. You did not keep separate payrolls for the four different openings?

A. No, but the men were grouped by mines.

Q. And you kept social security records and all those things, you operated under one set of books and one 164 set of records, didn't you?

A. That is correct.

Q. And, of course, your workmen's compensation insurance, and that sort of thing, was covered on the entire group regardless of the mine they happened to be working in?

A. That's right.

Q. Now, you did not maintain any separate seniority list, did you? In other words, all of your seniority list was on all the openings together?

A. No, that is not right. We listed each mine as a separate opening and a separate entity by itself.

Q. But I am asking you if you did not have just one seniority list, regardless of what you may say you go through. I am asking you if you did not just have one seniority list?

A. As a payroll agency or you mean—

Q. Yes, sir.

A. It is a card file, Mr. Kramer, that when a man was hired in it was put down with all of his dependents and the date he was hired for the purpose of the burial fund and benefits therefrom, and that is where our information came from as to the length of service of any individual man. It was kept all in one file.

Q. And you had one file regardless of which opening they worked in, it was all in one file?

A. That is correct.

165 Q. I believe you have heretofore testified about that, and all of it went into that card index where you went to get the length of service but which we call a seniority list?

A. That was where the information was available.

Q. And was the only place you kept it available?

A. All in one place for all employees, that is the only place it was available. It may have been available from payroll, working back and counting up when the man first appeared.

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Q. But, of course, couldn't have been kept then in any system.

A. No.

Q. When you begin to close down some of the openings and transfer men, you did not, however, follow your agreement and arrangement that the older men for similar work or like work were to be placed down on the new job, but you just picked those you wanted to regardless of how long they had been there?

A. I will tell you why we couldn't follow it.

Q. That is what you did do, isn't it? Answer the question yes or no and then you may explain. That is what you did do?

A. Well, you have to read the question again, you lost me a minute.

Q. What you did was when you were closing one of these openings and opening another opening, regardless of how long in point of service a man may have been in one of these other openings, you just picked whoever you wanted to put in a similar job in the new opening regardless of service?

A. Generally the procedure was to move the whole section down intact, which was a team. The No. 11 mine was a conveyor mine, somewhat mechanized. The No. 7 mine was a hand loaded mine worked by the room and pillar method and track and mine cars going into each working place.

Q. In order that the jury may understand, No. 7 and 11 are the ones closed out because the coal was practically exhausted.

A. That is correct.

Q. You closed those two. Then what happened?

A. No. 10 was going to be worked by a similar method to No. 7, and the men moved up there in room and pillar work where each man is assigned a work place and track

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is laid into his working place and the mined coal comes from that place and he loads it into the mine cars.

Q. That is the same as your No. 7 had been?

A. Yes. No. 7 men were earmarked for No. 10.

Q. Go ahead.

A. In the No. 11 seam we worked it with conveyors which did not take track into each working place and the men were grouped together as teams of four or five
167 for each working place and a conveyor laid up into the working place and the coal was put on that conveyor and conveyed, possibly 2,000 feet, out to the track in the main entry.

No. 9 was earmarked to be the same kind of a mine, and when you have a team of five men used to each other and producing coal and cutting it and shooting it and loading it into that pan line and get a supply back at the face, you just don't break that team up by putting a non-conveyor miner on that work.

Q. But as you opened this new seam which was going to be similar to No. 11, you did not put the oldest conveyor men to work in the new mine, that is where the trouble came up. You took the men from a particular unit as you call it, or section, and put them in a group regardless of the age of the men or how short a period they had been working and how long other men had been working, some 20 years. You just picked out another group and took them in there but you paid no attention to seniority?

A. Not necessarily.

Q. Maybe not necessarily but that was the result, wasn't it?

A. By section, you have more than one conveyor on a section. You have maybe 15 or 20 men on a section working a series of conveyor places. You try to keep those men together, particularly in the placing and in the
168 transfer over regardless of whether a man is a new

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man and there may be men who have been there 20 years but the new man is a part of the team.

Q. What you did do is unless you could take the whole 15 or 20, it did not make any difference how long some of these other men had been doing exactly the same work for your company, on the same mountain, in the same type opening, you left this older man with 20 or 25 years experience off of the job and took the younger man and put him in the new job, and that is where the trouble arose on what we call the April shut-down; that is exactly what happened, isn't it?

A. No, sir.

Q. What is wrong with that statement of what happened?

A. Well, what actually happened was the way I told you. There may have been a few qualified men but not enough to take enough of them, and you got several kinds of jobs.

Q. And you had some that were not qualified, but I am talking about the man that was qualified, that was doing the same type work up in this seam you are closing and not moved down to this other seam, and you got the same type work to do but you wouldn't take this man although he is qualified and has been for years because he was not associated with another group in another coal mine, some been there, lived there all these years, this man that couldn't go elsewhere and get a job because of his
169 age, you left him out in the cold and that is the trouble that occurred on the April shutdown?

Mr. Milligan: Just a minute. Your Honor, I would like to object to this line of questioning on the ground that it is irrelevant and immaterial to any of the issues. It is an attempt on the part of counsel to now arbitrate or settle a grievance which the union should have settled according to its contract three or four years ago.

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The Court: Is the objection to the tone of the voice of counsel in asking these questions or the tone of the voice of the witness in replying to the questions?

Mr. Milligan: Neither one.

The Court: I overrule the objection with the request that the witness and counsel soften their voice so as to eliminate any emotion in relation to the lawsuit. Just calmly and deliberately and the jury and the Court will be able to help understand the lawsuit much better if counsel and the witness will go at it calmly and friendly.

Mr. Kramer: Your Honor has knowledge that I frequently have a tendency to get excited in a lawsuit.

The Court: That is not a criticism of counsel or it is not a criticism of the witness. It is just an observation by the Court.

170 By Mr. Kramer:

Q. Well, such was the result, wasn't it?

A. I have told you exactly the way the company tried to plan it. Mr. Kramer, you have been told it, of course, from the other side.

Q. But regardless of what you say you may have tried to plan, the question I ask you is that that was the result that occurred there, isn't it?

A. I can't say without going back and checking the records for each individual man. The dispute was resolved after two days of work stoppage.

Q. This matter had been under discussion by the management and with the local union people for weeks before this stoppage occurred in April, the fact that you were moving these people as you claim by units or sections rather than seniority of men who were qualified, that you were going ahead by sections, and before this stoppage in April for weeks the men had been talking to you, to your foremen about—the local union and the men in it—about being unfair on account of that and finally after

Testimony of Guy B. Darst

talking for weeks it ended up in this two-day stoppage, didn't it?

A. As I recall it was a list of 40 or 50 men shown as the men laid off on April 15. The record will bear me out on this. They had known as of April 1st. We had arguments during the interim, between April 1st and April 15th.

171 Q. Maybe it was only two weeks, but during that two-week period after you laid off the 40 men, the local union and this mine committee, and maybe the president of the local, I don't know, had been down to you trying to get you to put these older men into those jobs where they were qualified and when nothing resulted between you and the time of negotiations, between the local and the management, then the work stoppage occurred?

A. That is right. As I recall we agreed to do that where it was possible and where the men were qualified.

Q. But still there were a lot of older men who were left off who had similar experience in jobs in which you placed younger men in the new opening, and that was the contention of the local union or mine committee and of the men themselves, right; that is why the stoppage occurred?

A. They were claiming jobs in the No. 11 mine which was an entirely different mine.

Q. But the main contention was not over the No. 11 mine but over a similar mine, at least a large part of it was over the similar mine?

A. No. 9 and No. 11, they were claiming the remaining jobs in the two seams.

Q. And finally there was this work stoppage on April 14 after they had talked repeatedly to you people—what
172 stoppage, the men didn't come out there April 14 that had been laid off since April 1st but talked to

Testimony of Guy B. Darst

you during that two-week period; what happened on April 14th?

A. I recall the men were classified according to age, classified according to their job, that is, all men of one job category was lined up according to age, and this is practically what we agreed to do prior to the meeting except we tried to speed it up and did replace some where it could be comparable.

Q. What actually happened in April after the shutdown, the men met with you and you did exactly what they had asked you to do by taking the man that is qualified and according to age with the company, put him on a job similar to the one he had worked on before. You did that and that is the reason the stoppage disappeared, that is it, isn't it?

A. We did exactly what we were trying to do before the work stoppage and maybe speed it up enough to satisfy the men.

Q. How many of these men that had been laid off for this two weeks were put on immediately on the 18th, the day after the work stoppage?

A. I can't say offhand but I have my payroll records and we can look it up, if you so desire.

Q. There were roughly half of those put on that very next day when you admitted they had more seniority.

173 A. They were replaced in the mine. An equal number of jobs—taken was the more skilled, and we have caved in and agreed to do that.

Q. Let's get to this caved in. You keep using that "caved in." The only thing you did was to put a man where he was qualified because he had more seniority than somebody else who had been on that job.

A. No, sir. We did what the men asked us to do even though it destroyed the efficiency of our operation, or part of its efficiency.

— 202a —
Testimony of Guy B. Darst

Q. Name me one man that you put in on April 18th that was not qualified, and tell me what his job was; name me one.

A. May I have the list sir that——

Q. I do not have a list.

A. That was filed in the exhibits with my deposition.

Q. You are talking about the pre-trial?

A. Yes, sir. Pre-trial list. I think the exhibit lists men who were cut off.

Q. Is this what you mean?

A. That is it.

Q. All right. May I stand here and follow you.

A. Yes. I will have to get the payroll to pick you out some men. Now I think Kleinicki.

Q. Fred Kleinicki was put on as what at this time which he hadn't been qualified to do?

174 A. A coal loader on a conveyor section.

Q. You are pretty sure of that?

A. I am not sure. That is the whole thing about it. I can go down the payroll and if you will permit us to get——

Q. We will not go further now.

Now the next work stoppage of which there is any reference made in this record is one of September 27 through the 29th and which you attribute to an act of God. Let's see about that one.

The Court: What year is that?

Mr. Kramer: 1950, your Honor.

By Mr. Kramer:

Q. You had what is called a mine camp, didn't you?

A. That is correct.

Q. You furnished housing to a part of the miners, or rented them to them?

A. That's right.

Q. Perhaps what, a third of your men or half of them?

Testimony of Guy B. Darst

A. Between a third and a half.

Q. You maintained the houses, the company did?

A. That is correct.

Q. Your company charged rent for those houses?

A. That is correct.

Q. I take it it was paid for in payroll deductions?

A. That is right.

175 Q. And as a part of the rental contract—first, did you have a written contract with the men about the renting or just a verbal agreement?

A. I think it had been carried over from a way back in these contract leases.

Q. There may have been at one time a written agreement but for a new man a written agreement was not made?

A. No, leases, just the rent was established.

Q. And the rent was so much per month?

A. That's right.

Q. In connection with that rent you were to furnish—were you to furnish both water and electricity, free coal?

A. No.

Q. Did they pay a water bill?

A. No.

Q. You furnished water?

A. Furnished water.

Q. And was not water in each house or were there just spigots out in the yard, what was the arrangement?

A. Some of the houses had water in them; some of them did not. There was a spigot that served two, three or four houses.

Q. Spigots outside somewhere in the yard where two, three, or more people would get water from it?

A. That is correct.

176 Q. There was no other source of water supply to the camp?

Testimony of Guy B. Darst

A. Net pure water.

Q. Water they could cook with or drink?

A. That's right.

Q. The fall of 1950 was somewhat dry?

A. That's right.

Q. But how did this water, how was it supplied, where did it come from, its source?

A. In a worked out section of the No. 10 seam water accumulated and filled up an acreage and we used that water as a reservoir. Pumped it over and down the hill into the camp. After it was up out of the mine down into the camp, it flowed by gravity. That water during that particularly dry season did not renew itself and the source ran out.

Q. What you did was maintain a pipe. You had a pump there in this reservoir, we will call it, an abandoned mine, and you pumped it over it entirely and then it went in a pipe down to the valley where the camp was by gravity and through that went to the spigots and into the houses?

A. That is correct.

Q. For quite a bit of time in the fall of 1950, prior to September, it was extremely dry, but you knew that water was about to run out?

A. That is correct.

177 Q. The men begin complaining about the low water supply along in the late summer, mid-August, some time in there, to you about this water supply?

A. We had a one day strike in August.

Q. And that strike is not a matter in this controversy, and you were promising the men you would see there was water put in immediately and arrangements made to get water to them, didn't you—that was in August, after the August difficulty?

A. Not as early as that. We were expecting a rainfall to refill our reservoir.

Testimony of Guy B. Darst

Q. But you told the men you would see that water got to them, available for them.

A. I am trying to remember, Mr. Kramer.

Q. Take your time.

A. I am not trying to evade the question at all.

Q. Get it accurate, take your time.

A. The company purchased but could not get delivery on some 4,000-odd feet—40-some-odd hundred feet of plastic pipe. The supplier did not have that much in stock. I believe, some time between, say, September 1st and the time of the strike.

Q. I will ask you if it is not correct and if—

A. I believe we tried to lay that pipe—we wanted plastic because it was very easily laid and you did not
178 spend a lot on labor to do it.

Of course the pipe costs more than galvanized pipe but the tendency was to save it in the laying of it.

Q. I will ask you if it isn't true, Mr. Darst, that although you and the men were realizing, and these women and children in the camp were realizing, that this water was about exhausted early in September, if you did not wait until about the 21st or 22nd or 23rd, your records will show, before you made any effort to supplement that water at all?

A. It very well could be. I can't remember.

Q. The result was when it came along at that time, even when you first made any effort to supplement it, you had to go far enough to issue an edict or warning to men who live out of the camp not even take a bath until you get home because there is not enough water, that was done even 10 days or approximately 10 days before you even ordered or made any effort to get any pipe or do anything to relieve the situation where these families live?

A. The other witnesses in this case will have a recollection of that, too, Mr. Kramer.

Testimony of Guy B. Darst

Q. I think so. That is true, isn't it?

A. The folks that did the actual purchasing of the pipe and so forth and so on.

Yes, we were trying to save the water when we saw it was going to get so low and run out. We tried to
179 save it for people to wash and cook and bathe there in the camp. We asked the men who worked in the mines and lived away from the camp to wait until they got home to bathe.

Q. And with that situation as acute and critical as it was, it was even bad enough that you let the water go certain hours in the camp and shut it off at night, they had to draw water certain hours of the day.

A. That's right, another measure to try to conserve the water.

Q. And finally about September 26, the day before or two days maybe the 25th, before this work stoppage there was no water at all in the camp for any use whatsoever?

A. I think that is correct.

Q. And they had nothing to cook with, no water to drink or anything, and then when that happened the men quit work; that is right, isn't it?

A. That is right, but this past year—in fact, there have been two years or three since then when the water ran out there was no grumbling and carousing when that happened. Something we could not help.

Q. When the men quit work and complained they had no place to bathe, no water for their family, then you met with them, didn't you, and immediately took some action to furnish water which you hadn't taken before?

A. It might even be that was when we tried to ex-
180 plore and get more water, after they struck.

Q. You mean you hadn't explored any effort to get water?

A. We hunted for it closer than a mile, which is a good

— — — — —

Testimony of Guy B. Darst

deal of money, a mile of pipe. I am trying to remember, Mr. Kramer. I am trying to.

Q. What you were trying to do was save that money for the additional mile of pipe, of course, from the appropriation standpoint and the people out of water down there. What happened after the men quit work, after complaining they had no water at all; what happened then. You met with them, did you?

A. I believe we did. Yes, we did.

Q. And who met with you?

A. The mine committee at that time I don't recall.

Q. Do you recall who were on that mine committee?

A. I believe Jim Scott was on it—this is subject to correction, but my recollection of the men were Jim Scott—if I could refer to my notes I could probably find you the men here.

Q. You gave the names of some of the men, Grant Mullins. Do you remember whether he was at that meeting?

A. I don't really recall. It seems to me he was a committeeman in the No. 11 mine. It was mostly No. 9 men who were living in the camp at the time.

181 Q. And when they met with you the day after this —the mines, I think they were down three days at that time, weren't they?

A. Right.

Q. And you met on the first day after they refused to come in, or the second day afterwards, the 28th or 29th?

A. I don't recall either one.

Q. You told the men you would see they got water immediately, didn't you, in the camp and you proceeded to arrange for it and the men went back to work just as soon as you told them they could have water for their families, their wives and children and themselves, they went right back to work?

A. I am trying to remember. I think you are correct

Testimony of Guy B. Darst

in that, but my recollection of it was also that at that time we could not feature the men pulling a strike because they couldn't get water.

Q. You thought they ought to go on and work anyway, whether their family had any water or not?

A. No, sir. We thought they should get out and get their water from down the hill a little piece and carry it up the hill like some were doing.

Q. They had been carrying water for quite a while, hadn't they?

A. I think so, some of them.

182 Q. How long after this did you actually get water to them?

A. I don't recall. Probably several days.

Q. But you started immediately to install this pipe that very day, didn't you?

A. I think we had to send after the pipe, Mr. Kramer.

Q. But you were able to get it as soon as they quit.

A. A long distance—I don't remember this but it seems like we sent a truck right from the mines to Cincinnati.

Q. But you hadn't sent it before that?

A. No, sir.

Q. You say that they did not arbitrate on this, want to arbitrate on that. What do you think they should arbitrate on that? You are accusing us of doing wrong because we did not arbitrate.

A. That is one strike that I think I said a while ago we did not have any arbitration on it.

Q. But you said yesterday, as I understood your testimony, that we refused to arbitrate each one of these?

Mr. Winston: I believe he is mistaken as to that particular strike.

By Mr. Kramer:

Q. You did not say anything about arbitration?

A. I don't think so.

Testimony of Guy B. Darst

183 Q. And although you did not claim we violated any agreement by the International or the District's actions at all in this strike, yet you have tacked up on that an item of \$4,075.18 as damages on that chart you have put in this morning and asked us to compensate for that, is that right?

A. That is correct.

Q. When there wasn't anything to arbitrate, was there?

A. No. Why did not the men who live out of the camp continue to work and who had access to water. The ones that could get water were claiming they couldn't get clean.

Q. Why didn't you start to get water to the men in the camp?

A. Because we did not realize—

Q. Let's go to the next one. The next one—

Mr. Winston: Let him answer the question.

The Court: Had you finished without asking counsel a question, had you finished your answer, Mr. Witness?

The Witness: What I started to say—

The Court: You may finish.

The Witness: —was this, that the company did not realize that a strike was in the air, that the men were as crazy as all that as to come out and cease work particularly when the majority of the men lived out away from the camp and had sources of water.

By Mr. Kramer:

184 Q. Did you call anybody connected with the District organization about this water stoppage, there was nothing to arbitrate?

A. I think we did. Maybe not myself but somebody in my office.

Q. Who did you call and what did you say to them, if you made the call or if not the call was made by someone else in your presence?

Testimony of Guy B. Darst

A. I think it was made in my presence by either Mr. Rains or Mr. Newman.

Q. Mr. Newman is your bookkeeper?

A. Office force; yes, sir. I believe the call went to Mr. Seroggs telling him we were out on strike, to see if he couldn't persuade the men to go back to work, that the company was taking more action to get water to them.

Q. You said "If you will persuade the men to come back to work we will take the action to get some water."

A. I did not make that a condition, no.

Q. You did not do the talking yourself. No, that was not the condition, Mr. Kramer.

Q. Well, the next one is this man Collingsworth, was that his name?

A. Yes, sir.

Q. He was laid off and that was on January 10, your Honor, and the 11th, 1951. Who was Collingsworth?

A. He was a mine foreman.

185 Q. You had had many complaints about Collingsworth cursing the men, hadn't you?

A. No, sir.

Q. And that was really where the trouble was, the Collingsworth trouble, because of his attitude toward the men and cursing them, wasn't it?

A. No. Along with the cursing he was asking them to do more work.

Q. Yes. You say he did not think they were putting out enough but in place of telling them—and I don't think you used the language, but he repeatedly said to the men with the strongest, what we generally recognize as oaths, would jump on the individual and use the vilest of profanity about the way he was working on the job.

A. Mr. Collingsworth, I don't think was quite that strong or not nearly that strong, Mr. Kramer. You have heard the other side of it.

Testimony of Guy B. Darst

Q. I will ask you if you don't know that he said in the meeting that was held the next day, "Well, if the men will come back to work I will quit my cursings, I will apologize," and if he did not actually say to these men the next day, "I am going to apologize for all the profanity I have used against you people." Isn't that what happened?

A. I don't remember him saying that. I asked him to quit it, the company did.

186 Q. But you had never asked him before; it took the work stoppage to get you to ask him to quit cursing his men, didn't it?

A. Well, you know how some men are made up, that is part of their make-up. That may be the way Mr. Collingsworth was made up.

Q. Who did you talk to first about this work stoppage?

A. Mr. Scroggs again. He came down and met with us.

Q. You asked Mr. Scroggs to come down?

A. To come down and see if he couldn't get the men back to work, they were striking illegally.

Q. Had you met with the mine committee before that?

A. No. They just all of the sudden one morning did not go to work.

Q. And then did you meet with the mine committee before you talked with Mr. Scroggs, do you remember?

A. It seemed to me that the next day, that is, the day of the strike—

Q. The first day they did not come in?

A. That's right.

Q. Yes.

A. The company called Mr. Scroggs to call the mine committee to notify them that they wanted to have a meeting that afternoon to iron out the differences, that is my recollection of it.

187 Q. And they did meet with you?

A. That is correct, with Mr. Scroggs.

Testimony of Guy B. Darst

Q. They did not refuse to meet, they met and tried to work out the difficulty between you?

A. That is correct.

Q. And was Mr. Collingsworth in that meeting?

A. Yes, he was.

Q. Do you think that was the day after the first day of the stoppage?

A. I think that was the first day of the stoppage. Generally these men have a meeting of their own down at the meeting place in town and vote to go back to work.

Q. What Mr. Scroggs said at this meeting, as soon as he came in the meeting, Scroggs said, "Well, I am going to get the men to go back to work," or at least, "I will get the men to go back to work," and then Collingsworth said after that, "Well, maybe I have been talking too rough and I will stop."

A. No, that was not the solution.

Q. That was the substance of what happened there?

~~A. No, that was not the solution of it.~~

Q. What is your version of it?

A. That Mr. Collingsworth would not be in charge of this mine but would be rather a section foreman when we had the closedown of the mines in the upper seams
188 that I told you yesterday, and that seemed to satisfy the committee and Mr. Scroggs and the men voted to go back to work the next day.

Q. In other words, you negotiated out a settlement satisfactory to both parties.

A. That's right—

Q. You just negotiated—pardon me.

A. No. What I was going to say was—

Q. In other words, what you did was just negotiated out a settlement between the local union with Mr. Scroggs there the field man from the District, and with you the other member representing the company, and you negotiated out a settlement of this difficulty.

Testimony of Guy B. Darst

A. We told the committee what the plans were, the future project and Mr. Collingsworth would not be in charge of an entire coal mine, and that seemed to satisfy the men. Why couldn't they have come—I don't mean to keep asking you questions.

Q. But in other words, instead of saying in you just negotiated out a settlement—you made a concession and they made a concession.

A. We did not make any concession.

Q. You did not make a concession?

A. We told them on that one, we told them what our projected plans were a little early, and I think it was 189 some months later before Mr. Collingsworth had people over him.

Q. Let's get it this way. The next day after this was over, was Collingsworth still their foreman?

A. That is correct. They asked the company to discharge him. He has been and was one of the best foremen that we have got.

Q. And you did not cave in, to use your language, and discharge him, but you just told him you were going to let him work until another section was opened and he would be working in a different job?

A. Not even that. Just that eventually No. 11 would come down to No. 5 to operate, and Mr. Collingsworth would have Mr. Fortner over him.

Q. So an arrangement was settled on your basis at that time. Mr. Collingsworth did apologize for the type language he had been using against the men, didn't he, or do you know?

A. I don't know, but it is safe to assume he did.

Q. Let's go to the next one. The next one is the one over the vacation pay, as you say, which was on July 30 and 31st, 1951, your Honor.

This vacation pay, according to your testimony this morning was due—or yesterday, I have forgotten which—

Testimony of Guy B. Darst

was the last week of June or right about the last week of June?

A. The last pay day in June before their vacation.

190 Q. And the vacation period is the period you had marked on that chart you filed here as Exhibit No.

7. I believe it was in blue?

A. That is right.

Q. In other words, it was not a period of time the men were supposed to work but they were supposed to be paid for it under your agreement.

A. That is the customary ten-day paid vacation.

Q. There were about 25 of those men that you did not pay vacation pay, wasn't there?

A. Not employees, no, sir. Those were 25 men who were entitled to a portion of their vacation pay and who were then and who had been laid off when the curtailment and the mines were closed down in the upper seams.

Q. Anyway, they were entitled under your contract to pay for the vacation period, a proportion of it if they had worked a certain proportion of the year, weren't they?

A. That is correct. They were due some vacation money; there were others that were due the entire week.

Q. What was the period of your vacation pay?

A. Always vacation is figured from June 1 through May 31st.

Q. How much time do you pay them? What amount of money are we talking about?

A. One hundred dollars per man for the whole 12 months.

191 Q. In other words, if he has worked the past year he got \$100.00 at the end of that year, which is June 30th?

A. That is correct.

Q. For his vacation pay.

A. Right.

Testimony of Guy B. Darst

Q. I mean, that vacation period really ends May 31st, calculated to June 1st but paid off May 31st.

A. That is the calendar year.

Q. How many men were there that you did not pay the vacation pay?

A. As I say I think about 25.

Q. How many of them would you say had worked only part of the time and had been laid off because of a change in operations and how many were entitled to the full \$100.00?

A. I don't know. Mr. Newman can testify to that. I don't recall.

Q. Some in both classes, you think?

A. I think some were entitled to the whole amount.

Q. During the month of July you negotiated over this the whole month, didn't you, you and the mine committee and your management?

A. That is correct. As I recall we had several meetings.

Q. You had several meetings, didn't you?

A. Yes, sir.

192 Q. And there was no work stoppage during those meetings, they were during the month of July?

A. That is correct.

Q. And you told the men in the early part of July in these negotiations, or maybe toward the middle of July you told them, you would be ready to pay and would pay all men the vacation pay the last of July?

A. All of them that had vacation pay coming to them got it when it was due, when it was customary to pay it, the last pay day in June. These 25, or whatever the number was, were men who owed the company and who were laid off and were moving away and who were, some of them who were leaving the job. In fact, some of them had gone away and came back to collect their vacation pay and had jobs somewhere else in the meantime.

Q. How many of them in that class?

Testimony of Guy B. Darst

A. I don't recall.

Q. How many of those 25, or whatever number it was, were still living in the camp?

A. My office force can answer that question; I can't.

Q. You told them, however, the negotiating committee or the mine committee, some time about in mid-July, "Well, now we will pay those who don't owe us. We ought not to pay the others because they have some bills at the store," and a local committee, the local mine
193 committee, was taking the position you couldn't withhold vacation pay for a store debt.

A. They were entitled to all of it in cash or get as much as the company owed.

Q. If there was not any demand for old debts then they would be entitled to all, if they hadn't owed the store bill?

A. No. The amount was agreed to. That was not the delay.

Q. But you and they argued, the local mine committee and you argued back and forth in several meetings during July and you finally said that you would pay them the last of July.

A. I do not recall making that statement. I do recall asking them to arbitrate the question and see what the men should pay the company and what they should get.

Q. Are you sure you asked them to arbitrate that question?

A. Yes, sir. I am almost positive I asked Mr. Scroggs.

Q. When was that?

A. During one or two of these meetings that happened before the strike.

Q. Didn't you work this thing out finally on an individual basis, man by man, rather than attempting to negotiate with the local or anybody else? What you finally did, you took it man by man and worked out
194 a plan under which they would pay a certain amount and it was worked out on this basis?

Testimony of Guy B. Darst

A. That is what I testified to yesterday.

Q. So there was not any effort of negotiating this amount or arbitrating with the union; it was a matter of making it man by man and working it out that way.

A. The company asked the board to arbitrate it and Mr. Seroggs politely refused to let it go to arbitration.

Q. Do you recall who was present at that meeting?

A. Yes. Mr. Jim Scott and Mr. Grant Mullins, and I have forgotten the third one. He might not have been there.

Q. They were members of the mine committee at that time?

A. That is correct. I was there, and one of my office workers, Dexter Rains.

The Court: Lady and gentlemen of the jury, keep in mind the instructions the Court has heretofore given you. Adjourn Court until 1:30 p. m.

(Whereupon, at 12:10 p. m. Court recessed until 1:30 p. m.)

195

Afternoon Session.

(Whereupon at 1:33 p. m., Court reconvened and the following proceedings were had in the presence of the jury, to-wit:)

The Court: You may proceed.

GUY B. DARST,

resumed the stand and further testified as follows:

By Mr. Kramer:

Q. Mr. Darst, the work stoppage, or strike as you call it, on October 2nd through October 8, 1951, which, as I recall your testimony, occurred over a difference in opinion with reference to credits at the company store, is that right?

Testimony of Guy B. Darst

A. That is correct.

Q. Now the company operated there at the mine a store in which groceries were sold, is that right?

A. Yes, sir.

Q. Did you sell furniture and hardware and that sort of things?

A. Yes, sir. It is a general store really.

Q. You operated, so far as generally speaking, as a relation between the company and its store on the one hand and the employees on the other hand, somewhat different in what we would call the furniture department than the department where the groceries were, didn't you?

A. Yes. The building was a two-story building.
196 The furniture, of course, was kept upstairs.

Q. You operated on what was generally known in the parlance—I don't know just what it was—but as a lease sale when you came to the furniture or hardware, things of that type, and the groceries were operated sort of on an open account basis, is that not correct?

A. That is right. When a man wanted a stove or something like that he signed—I forget what they call it, but it was a time thing where—

Q. Store lease?

A. Store lease, that's right, that is what they call it over there. It is a conditional sales thing, I guess.

Q. In fact, it was the same as we generally know in Tennessee as a Conditional Sales Contract?

A. I think so.

Q. The groceries were just sold on open account?

A. That is correct.

Q. And you kept two separate accounts for these people?

A. That is correct.

Q. The difficulty that arose, or this trouble that is in dispute on this October 2nd through October 8, 1951, was not over the grocery account but these so called lease accounts, wasn't it?

Testimony of Guy B. Darst

A. No, sir.

197 Q. Not at all?

A. No, sir. If I can review—

Q. You may do so. Go ahead, if you care to.

A. —what I think I covered yesterday. The company has extended credit to former employees up until the time of this strike. The company had put some 25—

Q. Would you mind explaining what you mean by “former employees” as you go along.

A. No, sir. When the mine shrunk up we could not keep employed the full work force that we had when we were operating in the four seams we were talking about this morning.

The No. 5 seam was being developed and places being made for men who expected and hoped to get jobs down there and who were laid off from employment at the time of this strike.

The company had extended approximately \$25,000.00, or something like that, in credit, maybe not all of which was to the men. That is credit we had to cease. But the company had gotten a lot of money so called on the books and was running out of money. It could no longer afford to carry and extend credit to the men who were expecting to be put to work at a later date.

We had to cut off that credit. Some of the men were leaving even after drawing credit and finding jobs
198 elsewhere, and when the company cut off credit—it was extending credit at the rate of \$3.00 to \$5.00 a day depending on the man and the size of his family—the family size was the rule of some on the amount.

And the company's position had gotten in such a way where so much money was on the books it could no longer afford to put money on the books, in some cases with no prospects of collecting it.

There was nothing to do with the store leases at all or conditional sales.

Testimony of Guy B. Darst

Q. You mean there was no part of the money that was then involved in that was owed for store leases or conditional sales?

A. The dispute was over—it was not over the amount of money. The dispute was over the stopping of credit to the non-employees that were not working for the company.

Q. When you say “non-employees,” of course they were still listed on your records there as employees of the company because they were subject to recall?

A. They were on what we call a panel.

Q. A panel, which is the recall list?

A. If we recall them those were the ones entitled to it.

Q. Entitled to be recalled. Now the people that you told, or did you tell them just at one time “We are
199 cutting off this credit,” or what did you do about it?

A. I think over the week-end before the strike, which begin on Monday, that we had told the men that we could no longer carry them, and for them to please, if they could, arrange it to look to the local union for help which at that time had some money in reserve.

Q. And the mine committee asked you then for a meeting on that, didn't they, and you had a meeting that week?

A. That's right, we had a meeting.

Q. And you discussed it.

A. I think I asked for the meeting.

Q. Before the strike, during the week, the mine committee asked for a meeting before there was any work stoppage, didn't they?

A. I believe so. We never refused to meet them.

Q. And that is what I am getting at, before there was any work stoppage you went over this credit proposition, you and the men on the mine committee had a meeting—I don't know whether anybody was with you or not. Do you remember who was with you in that meeting?

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A. My bookkeeper, probably.

Q. You and the bookkeeper and the mine committee. That was before there was ever any work stoppage, wasn't it, and then you did not get together on anything, 200 you were trying to get them to make some other arrangements.

A. It was only fair we notify them ahead of time.

Q. And then you just on a Monday, or Saturday, whichever it was, you just told them there was no more credit for these people after you had had that meeting.

A. Yes, a day or two ahead after—

Q. You did not try to arbitrate anything that time; you did not suggest any arbitration.

A. There was no dispute.

Q. I am just asking you, did you suggest any arbitration?

A. There was no dispute until after the strike got under way.

Q. But you had stated, as I understood you yesterday, on every one you suggested arbitration, but you did not suggest arbitration on that item, did you?

A. No, not before the strike. Let me qualify that a little more if I may.

Q. Before the strike. We will come to the strike later. Have you got anything before the strike, go ahead and do it.

A. We asked for a meeting, of course, after the strike started, and asked that the dispute be arbitrated.

Q. Before the strike—I will come to after the strike.

Is there anything you want to add before the strike?

201 A. No.

Q. They had tried to negotiate with you, no arbitration had been suggested, then there was this work stoppage, is that right?

A. That's right. Nothing was said in the meeting be-

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forehand however that there was going to be a work stoppage.

Q. And nothing was said you wanted to arbitrate the dispute either. Let's go to after the strike. The men did not come out to work and you asked for a meeting. Who was at that meeting?

A. The mine committee, I believe the president of the local union, and Mr. Scroggs, and of course myself and the office bookkeeper.

Q. Are you sure Mr. Scroggs was there at that meeting?

A. Yes, sir. We asked him to come down.

Q. How many meetings did you have before that matter was settled after the work stoppage begin?

A. There was at least one more, of course, after the meeting at which Mr. Scroggs came down.

Q. Why do you say at least one more of course. What do you mean by "one more, of course"? Were there two meetings?

A. Two meetings during that week we were off.

Q. Mr. Scroggs present at both of them?

A. No.

Q. The second meeting was by you and your representative, some of your own men with you in management, and the mine committee, wasn't it?

A. If I recall that is correct.

Q. Who were all the mine committee present at that meeting?

A. I believe Grant Mullins and Fred Tyler and Jim Scott. I am not sure about Fred Tyler, whether he was on the committee or not.

Q. What happened was the men agreed just to your proposition that the union would, the local union and not the international nor the District, but the local union would guarantee a store account for these men who were

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waiting for re-hiring, didn't they; local union agreed to guarantee it, you agreed on the local union guarantees, that you might give goods?

A. That is right.

Q. Just what you had asked them to do, wasn't it; just exactly what you asked them to do?

A. Yes, sir, but I was trying to think whether that meeting was on Monday or Saturday.

Q. Regardless which day it was you did not cave in on that, you got exactly what you asked, didn't you, that the local union would guarantee and so there was no caving in by the company on that, was there, and I use "cave in" quotedly because that is what you used yesterday.

203 A. I am merely trying to remember exactly what I can about this strike. It is coming back to me now.

Previously the company was not willing at that time to accept the local guarantee. Previously during the 1949 work stoppage or strikes, where we worked three days a week for a time and missed several months of working time due to National strikes—

Q. We don't want to go into that.

Mr. Winston: Let him answer.

Mr. Kramer: That is not responsive to the question.

A. (Continuing) I am trying to give you some background of why we were so long in reaching an agreement on this particular dispute.

The company accepted the local union's guarantee in writing to—it was a local arrangement—to guarantee the accounts of the men in those short work times in 1949 and 1950.

In fact, the union, the local union, advanced some money for the purpose of keeping their men alive after the company had extended as much credit as they had or could afford. The arrangement was that when the men went back to work this money would be paid back—

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Mr. Kramer: Well, your Honor, I am not interested. I am going to object to the witness——

The Witness: Maybe I am telling the story too long.
204 The company got stuck on an arrangement with the local union before for some \$3,600 or \$3,800, when the local union did not live up to their guarantee on the credit extended during previous strikes.

By Mr. Kramer:

Q. Now, since we have gotten into this, as a matter of fact, the local union one time loaned the company, to keep the company in operation, some \$12,000 or \$15,000 and wrote them a check for it, didn't they?

A. It was \$10,000.

Q. They wrote a check and loaned it to the company, \$10,000 at one time, didn't they?

A. It was not all at one time. I believe it was over several weeks' period and several checks.

Q. They did make several loans to the company?

A. That is true.

Q. Neither of those things have anything to do with this lawsuit, but let's get down to this lawsuit.

Mr. Winston: I object to Mr. Kramer arguing the case and making a statement. Mr. Darst was trying to show that he was not trying to get the local to guarantee the credit before the strike and showing the reason why.

The Court: I will let the witness answer and let's go on, gentlemen.

Mr. Winston: I object to Mr. Kramer making state-
205 ments and arguing his case.

The Court: Mrs. Stansberry and gentlemen of the jury, you are going to decide this case on the evidence from the witness stand and under the law to be given to you by the Court, and you will keep in mind all during this hearing that statements of counsel on either side, or both sides, are not evidence. They state their positions of the respec-

tive clients with which you may agree or not agree, but you will not decide the case on what they say. You will decide it on what the witnesses say and under the law to be given to you hereafter. All right.

By Mr. Kramer:

Q. You have shown on the chart that you had work stoppages on October 1 through October 8, 1951. Now that is eight days, one through eight, and you counted on a Saturday and a Sunday, or two Saturdays and two Sundays in there.

A. I am only claiming the working days that that occurred, that we missed, of course, on Monday through Friday. We leave out Saturdays and Sundays. If it is an eight-day claim it is wrong. It is six days, and the figure on the chart—

Q. You counted six days by the chart, showing the 1 through 8. You have eliminated whatever Saturdays or Sundays was in there and you say six work days
206 during that period, is that what you mean the jury to understand?

A. Yes, sir.

Q. Let's go to the next one, which was, as I recall it, the Tabor lay-off, November 7 and 8, 1951. Who was Tabor?

The Witness: May I ask the Court a question?

The Court: Yes, sir.

The Witness: I don't think I got across what happened at the advance of credit. Can I extend my remarks a little more on the October 1 through 8 strike?

The Court: Yes.

The Witness: The company got a loan from them, but they got back the loans to the penny.

Mr. Kramer: That is 1949.

The Court: I will let him make an explanation. You went into it, Mr. Kramer.

The Witness: They failed to collect from the men some

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\$3,000-odd dollars to what they paid back to the local union.

The company was extended and did not want to enter into an agreement like that with the local union during this strike—it is coming back to me now—and preferred that the local union give the men individually the credit rather than have the local union guarantee it with the company issuing it.

207 But the local union did not do it and we finally worked out an agreement in line where the local union from that day on would be responsible for credit issue to the men.

That winds that up.

By Mr. Kramer:

Q. On yesterday afternoon, you testified that in the first meeting you asked the local to guarantee the account. You are now testifying differently; which is correct?

A. This last is correct.

Q. And you were wrong yesterday in your statement?

A. I was a little bit wrong yesterday.

Q. Your testimony yesterday was you asked the union to guarantee the account. This afternoon when I started the examination of you, you still said——

A. That is——

Q. You still said that the arrangement was for the union to guarantee the account, but now you change it and say the way you wanted to work it out was the union would loan the money to the men individually and let them pay the account?

A. That is what the company wanted at the beginning. In the end they finally agreed, the agreement was finally worked out between the local and the company, that the company would issue and continue credit with the
208 local union guaranteeing it.

Q. And you don't know why yesterday you said that is the thing you wanted in the first place?

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A. That still isn't changed. We wanted a guarantee that we would get our money back.

Q. You said, though, Mr. Darst, and I don't want to dwell on a lot of immaterial stuff, but you said yesterday that the way you made the proposition to the men at first was that you would go ahead and extend credit if the union would guarantee it. You say now that was not your proposition?

A. I am not——

Q. Do you care to answer?

A. I do.

Q. Please do.

A. That was the proposition at the end, and when, at the final meeting when—we held more than one meeting, when we finally——

Q. You have already said there were two meetings.

A. In the final meeting that was the final arrangement we came up with after the company was assured that it could collect its money back.

Q. You say that was not your first proposition?

A. I do, yes. The facts are coming back to me now.

Q. Of course, you have thought of this lawsuit a whole lot before you testified even yesterday, before that,
209 and it hadn't come back to you but just now it has, is that correct?

A. That's right. There has been a lot of work in getting this lawsuit prepared.

Q. We were down to the Tabor question at this time when you went back. Who was Mr. Tabor?

A. He was on a motor crew, a two-man motor crew, locomotive crew on the main line tram in the No. 5 mine.

Q. And your statement yesterday was that, and again this morning, that there was a one-day shutdown on November 2nd when the men did not report to work and said there was a later one on November 6 and 7. Two

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different shutdowns, one for one day and one for two days, involving this man Tabor.

Mr. Winston: May it please the Court, I believe Mr. Kramer is mistaken again.

The Witness: We have corrected that. The 6th turned out to be a day that was not a strike but the election day.

Mr. Kramer: That is the first time I have heard the statement "election day."

Mr. Winston: If you will consult the chart you will see plainly the 6th is——

By Mr. Kramer:

Q. But the testimony yesterday was November 2nd and November 6th and 7th.

A. No, it was not. It was 2nd and 7th only, 2 days.

210 Q. Well, has there been anything said about election day in this record since we started yesterday morning?

A. Nothing been said about election day except the strike was on the 2nd and 7th.

Q. The pleadings say the 2nd, 6th and 7th, and the chart originally, but now you say it is two days of November 6th and 7th.

Mr. Winston: Pardon me. I hate to interrupt, but Mr. Kramer does get the facts mixed up. The chart did not originally say that, to my knowledge. It has the blue coloring, and I think it has always been that way. I don't like to interrupt, but I don't like to get off on false angles.

Mr. Kramer: Well, of course, I don't want to be sworn, but your Honor saw the chart yesterday and I will leave it to your Honor as to what the chart said yesterday.

The Court: All right.

Mr. Winston: That is my recollection.

Mr. Kramer: Well, other people are mistaken in their recollections, too, my friend.

Mr. Winston: Yes, sir.

Testimony of Guy B. Darst

By Mr. Kramer:

Q. And, anyway, we now have it down to two days, the 6th and 7th, regardless of what this record may previously say.

211 A. That is correct.

Q. In other words, the 2nd and 7th?

A. 2nd and 7th.

Q. You say there was a shutdown—on yesterday you said there was a shutdown on November 2nd over this man Tabor?

A. That is correct.

Q. Tabor had been discharged, as I understood you, because you said he was an habitual absentee.

A. Correct.

Q. The men were off only one day. Had there been any complaint made about Tabor before that time?

A. Oh, yes, every week. We had to pull a man—

Q. To the committee.

A. It had been discussed with the committee, but not by me.

Q. Well, you were not present when any discussion was had by the committee over it?

A. No.

Q. So all you have is hearsay on that. On November 1st he was told he was through, is that right?

A. Monday, yes, sir.

Q. November 1st, which was Monday, he was told that he was through, and you people made no effort to go through the grievance procedure or arbitration on that, did you, you just laid him off?

212 A. We discharged him for cause.

Q. You discharged him for what you said was cause?

A. Yes, sir.

Q. The man stayed off one day and came back and then they were off one other day on November 7th on it?

Testimony of Guy B. Darst

A. That's right.

Q. I believe you said yesterday that somebody came and on "bended knee" was the exact expression you used, and begged you to take him back and in response to that you agreed to take him back, is that right?

A. That's right, on the second strike. He was supposed to have—why the strike was two days and separated days, the man thought he had a job.

Q. Of course, the Court ruled on that yesterday, you had no knowledge, and the Court sustained our objection because it was hearsay. If there is something else you want to tell us, that is something else.

On this November 7th, he came back on the 8th, went to work, and he made an excellent man, hasn't he?

A. For a time after that he made a good man; yes, sir.

Q. You testified on pre-trial you had no other trouble with him and he made a good man.

A. That's right.

Q. And that is correct about him, and you had made no effort to go through arbitration about him before, had you?

213 A. No, but we requested that the matter be arbitrated after they struck.

Q. Afterwards but we are talking about arbitration prior to any trouble. You people made no effort to arbitrate no more than anybody else, did you?

A. I don't know of an effort by the company—

Q. Answer that question then you may explain. You made no effort to arbitrate before?

A. No, we discharged him because he was missing about one-third of the time. He was supposed to be in a key job.

Q. Let's go to this next one which was the trouble that you claim you had over this man Campbell, and you have given us two instances in which there were lay-offs, one

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one-day of February 8, 1952, and the other of April 24 and 25, 1952. Who was Campbell?

A. He was a construction contractor whose experience was mainly or mostly with building of tipples and bins.

Q. Do you have him here as a witness?

A. We do.

Q. When did you first make a contract with Campbell?

A. Mr. Campbell came to see me in the early part of August, 1951. Somebody had referred him to us because we had a prospective job coming up for the construction of a bin and an aerial tramway which would dispose slate into a neighboring ravine or hollow. We contracted 214 Mr. Campbell on or about the 15th of August, 1951, to do this construction work for us.

Q. Under the written contract as filed here yesterday as Exhibit No. 4?

A. Yes, sir.

Q. Did he start work immediately?

A. Yes, sir, he did. He started work the following week after that contract was dated.

Q. Now his men, a number of his men joined the United Mine Workers of America, didn't they?

A. Yes, sir, later on.

Q. I don't mean after February 8 but prior to February 8, 1952; prior to the first work stoppage you have here.

A. I can't say to that. I don't really know.

Q. Didn't he tell you they had?

A. What I said yesterday was that I believe some of them had belonged to unions and some of them had not belonged to unions. Beyond that I can't say.

Q. Mr. Darst, prior to February 8, 1951, had you told Mr. Campbell that he must discharge the people that he had who belonged to the United Mine Workers of America?

A. No, sir.

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Q. Prior to April 25 and 26 did you make that statement to him?

A. No, sir.

215 Q. Did you tell anybody else about that time you had so stated to him or had so requested him?

A. No.

Q. You are positive of that?

A. I am positive of that.

Q. Did you learn that any of his men who were working for him on the job had become members of the United Mine Workers of America?

A. Yes. Mr. Campbell went and signed a contract with District No. 28, made a trip up there after the February strike for his men to belong to the United Mine Workers.

Q. Do you know that he, himself, joined and became a member?

A. I do not know whether he did or not.

Q. Have you ever heard of that?

A. No, sir. That is news to me.

Q. You finally discharged him and told him you did not want him to do any more work under this contract, didn't you?

A. No, sir.

Q. You terminated the contract with him, didn't you?

A. It was a mutual thing, I think. He and I both agreed to quit.

Q. And when was that?

A. In the summer of 1952.

2 Q. You had mutually agreed to quit and had quit
216 before the rope burned up you told us about yesterday?

A. That's right.

Q. You and he had put an end to that contract, a voluntary agreement between you, and left the rope laying on the ground which you claim was burned up.

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A. We had agreed to quit temporarily and come back and finish the job when we could, that was the way it was.

Q. You had no date fixed to come back?

A. No.

Q. You had no material on the ground, or not sufficient material to anything like finish the job?

A. We had material to go along substantially with the job, yes.

Q. You had some material but not near enough to finish the job?

A. No, sir, but I believe that the material had been ordered, timbers.

Q. And that material was never delivered to the job, the rest of it?

A. If I recall correctly the order was cancelled with the timber man.

Q. After you and he agreed to discontinue the contract voluntarily, the two of you agreed to cancel that outstanding order he had for remaining material?

A. After we had agreed in general to cancel it. We
217 suspended the order. We told the timber people, I believe, that we would let them know when we wanted it.

Q. "If we ever want it we will let you know?"

A. That is right.

Q. You say you think that was in June or July, 1952, July or August, 1952?

A. Yes, sir, in the summer.

Q. The summer of 1952.

A. I have forgotten the exact date.

Q. It was after that that the fire occurred and this rope you talked about yesterday burned up?

A. That is correct. The rope was left in place rather than go to the tremendous expense of taking a bulldozer to pull that laying on the ground to roll it up with the idea of resuming the project.

Testimony of Guy B. Darst

Q. Rather than going to the expense of having it rolled up you just left it laying on the ground and later on it was burned up when the forest fire swept down over that area?

A. That was in September and October of that year.

Q. Well, let's take the one of August 5 and 6, 1952, which was the time Mr. Roark and Mr. Anders were discharged by your organization, weren't they?

A. Yes, sir.

Q. What type work were Mr. Roark and Mr. Anders supposed to be doing? What were their job classifications, to use the exact language?

A. I would have to look back on my payroll records to know their exact job. It seems to me that they were supply men and engaged in loading supplies and taking them underground.

Q. Were they not track men?

A. I won't deny it. I don't know.

Q. Now it was not their job to pick up this motor that was there that went over the bank, was it?

A. Yes. They had been given that job. They had been working at that from time to time before.

Q. Picking up motors and things of that sort?

A. Using the motor for transportation and hauling of supplies, and so forth, track materials.

Q. Was not the first complaint that you got about this after they were discharged was that these people had been assigned to a task that was not in the scope of their employment?

A. No, that did not come to me.

Q. Was not that the basis on which a settlement was made?

A. The company agreed to take those men and put them back to work at something else.

Q. You did not put them back at the same job but

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219 on another type job. That is what you said yesterday.

A. A different category—on a different shift, I believe, if I remember right.

Q. But you said yesterday you created a new job for them. You said you put them on a new job, in fact, "We created a new job for them." I think that is verbatim what you said, "Made a job for them."

A. What I think I said was that I thought we made a job for them. We wouldn't have put them to work if it had been a wasteful job. We put them on a shift doing a job that needed to be done.

Q. You say you put them back on a job you made for them. You are going to stay with that, are you?

A. That is correct.

Q. Somebody else had been fooling with that motor before it went over the bank, hadn't they?

A. The motor, when it is parked, generally has the juice turned off and the trolley pulled. The current passes through from a trolley wire, what we call dogged down with the clip—

Q. Clipped down.

A. Yes—on a cable, locomotive with a cable, the nip is taken off. It is customary to cut off the juice, off the line, when you get done at night or at the end of a shift.

Q. What is the purpose of disconnecting the motor
220 in that way?

A. That is for a safety precaution at least, to keep any possible contact away.

Q. So that the motor can't be moved unless that clip is clipped up again?

A. That is correct, on the cable with what we call a nip, you hook it on the wire.

Q. Somebody else though had done something to this motor—not these men but someone else had done something to it then.

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A. That's right. The camp is full of kids and people strolling and—just as I say, some of them will go down and get in and play around and turn the controller on.

Q. Because of what somebody had done to this, this motor went over the hill?

A. It is common practice when anybody would use the motor to see the current in the controller is turned off before any current is put in contact with this motor.

Q. That is for people who are familiar with that type work, but these people had never done that type work before, had they?

A. These men were fully capable of running the locomotive, otherwise they would not have been assigned to that job.

Q. Let's answer my question. These men had never
221 done that type work before, had they?

A. No, that is not correct.

Q. You mean they had done it before?

A. They had done it before.

Q. And moved motors like this before?

A. Moved motors like this before. These were old timers that had been on the Benedict job a long time.

Q. They were employees that had been there for years?

A. That's right.

Q. And hadn't given trouble before that accident, is that right?

A. To my knowledge, no.

Q. And when this occurrence came about and this motor went over there, they were discharged immediately?

A. They had become careless and they were discharged immediately. The company was trying to enforce a little discipline again, and you just can't fire a man even for cause without having a strike over it.

Q. In other words, that is your feeling rather than testifying to the facts that occurred there. You have discharged other people at other times, haven't you?

Testimony of Guy B. Darst

A. Yes, sir.

Q. And did not have a strike over it?

A. Almost invariably we have a strike.

Q. I will ask you if you have not discharged men at
222 other times and did not have a strike over it?

A. Yes, I can remember one or two cases in the ten years I have been there where we did not have a strike over them.

Q. In the period 1950 through 1953 you did discharge several men that you did not have a strike over, didn't you, in spite of what you just said, is that correct, or isn't it?

A. I don't recall anywhere we did not have strikes.

Q. Do you deny that you did? And when I say you did, do you deny you discharged anybody during that period?

A. No, I do not deny it.

Q. You don't deny it?

A. No. I don't recall it right now, that is all I can say.

Q. On this Wage Stabilization matter that occurred on October 16 through October 27, you are familiar with that entire transaction, aren't you, and know what happened?

A. Yes, sir. The Wage Stabilization Board would not allow—

Q. Let's go back to the beginning. There had been some negotiations in Washington between the United Mine Workers, represented by Mr. Lewis, and the Coal Operators, your group of people, represented by Mr. Moses, in which the union, the International Union now, and the operators had agreed on a \$1.90 a day increase, hadn't they?

223 A. That is correct.

Q. And that was to be effective on October 1, 1953, wasn't it?

A. To my best knowledge, yes.

Q. Now at that time there was in existence in this

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country on account of the Korean situation what we know as Wage Stabilization.

A. That is correct.

Q. And under certain conditions increases in wages were under edict or directives, so to speak, approved by the Wage Stabilization under certain conditions, under the Wage Stabilization Board or director, which ever it may be at the moment?

A. That is my understanding.

Q. When the matter went before the Wage Stabilization Board, the Wage Stabilization Board said they would approve—submitted by Mr. Moses, your representative, the representative of the operators, and the Board said that they would approve an increase up to \$1.50 a day but no further than that?

A. That is right, except I believe it was submitted by both sides, was it not?

The Court: You used the year 1953. Was that 1952?

Mr. Kramer: 1952. It is 1952. I am wrong on that all the way through. When I am referring to the Wage Stabilization Board, it is 1952.

224 By Mr. Kramer:

Q. Well, we are not going to argue, but I think you will find it was submitted by Mr. Moses and the Board refused to approve but a dollar and a half, is that correct?

A. That is correct.

Q. Now there was no local work stoppage called at your mine, was there, it was here and there throughout the country but not universal, but at coal mines over the United States spasmodically, some refused to operate and others went ahead and operated on the dollar and a half increase basis?

A. I think the men were being paid \$1.90 by the other mines and we—

Q. Let's stay with that first before we get into some-

Testimony of Guy B. Darst

thing else. All those that operated at that time, that is after October 15—this thing happened October 1st and nothing happened until October 15, then after October 15 some of them operated, everybody operated practically up to the 15th, but after October 15th some operated in one field, say Pennsylvania, and some didn't, some in Ohio operated and some didn't—talking about union mines—in West Virginia some operated and some didn't, in Kentucky some operated and some didn't, and you think all that did operate paid \$1.90?

A. No, I do not know about all of them but from direct knowledge, that is my information, all the mines of
225 the adjacent field in Harlan County.

Q. But some of them worked and some did not.

A. That's right.

Q. It was not local, it was a proposition that was national in scope although there were places throughout the entire coal mining industry that some worked and some did not?

A. What you are saying is some worked and some did not.

Q. Throughout the national picture. It was broader than just in your Virginia field?

A. That is correct. Some worked and some did not.

Q. And so that neither the International or the District had anything to do with it. It was just a question of whatever the people in the particular locality, or miners, decided to do, that is what actually happened, was it not?

A. Not necessarily. The miners did not follow what John L. Lewis wanted them do in these various places. Some did and some did not.

Q. What proof have you as to what Mr. Lewis wanted them to do at that time? Have you any instructions given by Mr. Lewis, the president of the International?

A. My proof is kind of negative, and it goes in this way—

Q. Well, you are making an argument on it, but have you any letters from him; did you talk to him?

226 A. No. The articles and letters were published in the newspapers at the time.

Q. Do you have copies of them here?

A. Yes.

Q. Of course, you can't state——

A. The reason is——

Q. We would object to stating what somebody said or some article says unless you want to introduce it.

A. We intend to introduce it, I believe.

Q. Then when we get to it we will take care of it. But your mine, along with many others over the country, did not operate during that period of time?

A. That's right, the reason being that 40 cents of the \$1.90 agreed upon was being withheld from the men.

Q. Was it being withheld from the men? I will ask you if at the time the mines begin paying the \$1.50 and holding 40 cents waiting determination it was not on the directive of the President of the United States, and if that was not on October 26 and when that was done the men went back to work, there was no withholding of the 40 cents?

A. We offered to not withhold the 40 cents to our men. We got referred to the District. I called for Mr. Condra. Mr. Condra was out at the moment and I talked to Mr. Scroggs instead, and we were turned down on the proposition that if we paid our men we could go on back
227 to work like other mines.

Q. And at that time there was a statute that said that unless the order of the Wage Stabilization Board was modified, whoever violated it, two or more, that entered into the violation, they were guilty of a criminal conspiracy, and that if you and Mr. Scroggs had agreed to put the men back at \$1.90 you were both guilty of a criminal conspiracy, and Mr. Scroggs said, "I don't know

what I could do," and they did not go back until there was an Executive Order issued from Washington clearing the matter nation-wide; isn't that what happened?

A. On the matter of criminal conspiracy, I don't know. That matter was never brought up, and may I state the reason that we did not go back to work?

Q. Mr. Seroggs told you he did not know what he could do, didn't he?

A. He said, "Oh, no; we can't do that. I have to wait and see. You can't pay these men."

Q. And there was an Executive Order issued by the President of the United States in the latter part of October, maybe the 26th, 27th or 28th, I am not sure, in which that was cleared through the Wage Stabilization Board and the minute that was cleared your men returned to work as they did all over the United States?

A. That is right, except for the mines that had
228 worked right on through that period.

Q. And from that time on until there was a final determination of that issue 40 cents was withheld under the Executive Order of the President of the United States and you paid the dollar and a half?

A. That was all we could do. The men would not take the 40 cents and go back to work.

Q. But you did pay the dollar and a half and held 40 cents and the men would not take the 40 cents then because the Executive Order issued by the President of the United States said you shall only pay the \$1.50 and the operators shall hold the 40 cents until the matter has been determined by the Wage Stabilization Board?

A. We wanted to and needed to work so badly we wanted to go back to work and do like the other mines who surrounded us, and as we said some did not and some did and we wanted to be some that did work.

Q. There was not a mine in Virginia operating during that period, was there?

Testimony of Guy B. Darst

A. I don't know, but there were mines in the Big Sandy district, Elkhorn Field and Harlan.

Q. Some in the Harlan and Big Sandy worked despite the Executive Order?

A. That's right.

Q. But your men did return just as soon as the
229 Presidential Order came out, didn't they?

A. That is correct. The record shows we went back to work on——

Q. The 28th?

A. I can't read it from here.

Q. Now you have one more that you talked about, the Big Mountain, yesterday, and which occurred, your Honor, May 18th through the 27th, 1953, what is called the Big Mountain stoppage.

Yesterday something was said about the lease that was in existence between you people and Big Mountain. In other words, Big Mountain was going to operate on your land?

A. That's right.

Q. I don't believe you filed that lease, did you?

A. No, we did not.

Q. Do you have it here?

A. May I ask my attorney if we have it or not?

Mr. Winston: We have a copy of a lease that was unsigned, sir. It is here with some of my papers. If I don't have it right here I can find it.

The Witness: We have a copy of the lease.

Mr. Winston: The copy we had, as I recall, was not signed.

The Court: If it is a correct copy that does not
230 matter.

By Mr. Kramer:

Q. Anyway, you were connected with the Big Mountain people, weren't you?

Testimony of Gay B. Darst

A. Not at that time; no, sir.

Q. Well, I mean, Benedict Coal Corporation and Big Mountain were operating together under your agreement?

A. Oh, yes.

Q. In other words, you were not independent operators entirely but you were operating sort of in connection together?

A. We were independent operators.

Q. Different corporations but you were working together?

A. Well, here is the situation, you can interpret it any way you want to.

Big Mountain Coal Company leased certain contour coal around the crop line of certain seams on the Benedict property to recover by strip or auger mining, from the Benedict Coal Corporation. Benedict agreed to sell the coal, market it, put it through its screening facilities, preparation facilities, and for which service they were to get 25 cents a ton profit.

Q. Let's get at it this way. As I understand the situation you owned the land, they were going to take the coal out by strip mining, you were going to put it through
231 what we might call the finish process, make it available for the market after having gotten it from the ground, and so you were working together on that, and then you were to get out of the money that was received from the sale of the coal, you were to get 25 cents a ton?

A. That's right, for our part in processing and marketing the coal.

Q. In addition to that you were to get so much per ton for the royalty basis for the coal that was removed?

A. That's right. The 25 cents was net profit. The other costs were to be borne by the Big Mountain Coal Company, also 10 cents a ton royalty on the coal to our own land company.

Testimony of Guy B. Darst

Q. But the men who worked down at your chutes, and that sort of thing, you paid for that. Did they have men on the same tippie who would—

A. No, they did not. It was the Benedict tippie force.

Q. It was the Benedict that handled the coal through the tippie?

A. That is correct.

Q. Where did the Benedict people take over that coal, at the end of the drift or—

A. He paid the expense of handling it into the head house, which is the tippie—delivering it into the head house. After that—

232 Q. Then you people took care of the expense from there on through?

A. That's right, but he paid—the selling cost was his expense, Benedict's fee for handling the coal was 25 cents over and above all expenses to Benedict for handling.

Q. You people operate a sales agency—and when I say "you people," I mean Benedict, didn't you?

A. No. The sales agency is a separate outfit.

Q. Well, you sold this coal.

A. Through Benedict's regular—

Q. Big Mountain, you were responsible for making the sale of the coal?

A. That's right, through Benedict's regular sales connection.

Q. Benedict, in other words, controlled the sale of that coal?

A. That's right, through its sales connection; yes.

Q. And you paid for it and then billed that back to Big Mountain?

A. That's right.

Q. Who constituted the sales agency; was it a separate corporation?

A. A separate corporation.

Testimony of Guy B. Darst

Q. Owned by the Darst Benedict Coal Corporation?

233 A. No, separate ownership, except that my father is a stockholder in both corporations.

Q. Well, Benedict as a corporation owned stock in the sales agency as a corporation?

A. No, sir.

Q. There was no inter-locking of stockholders?

A. No inter-locking of stock—of stock, you mean?

Q. There were no common stockholders, were there not, in the sales organization?

A. Yes, I believe so.

Q. Most of the stockholders were common stockholders?

A. Not most of them, no. A few, three or four, who were common stockholders in both companies out of a list of probably 80 or 100 stockholders of Benedict.

Q. Would you mind giving us the name of your sales agency?

A. No. Holmes-Darst Coal Corporation.

Q. Was it known as that during this period of time?

A. That is correct.

Q. This work stoppage at Big Mountain, what you classify as the Big Mountain stoppage, you say began on May 18th?

A. That is correct.

Q. I notice in this provision of the Collective Bargaining Agreement which we read this morning, 1952, there is this provision:—This is on page 3, your Honor,
234 under the heading "Miscellaneous."

The Court: The 1952 Agreement?

Mr. Kramer: Yes.

By Mr. Kramer:

Q. "Each operator signatory or who may become signatory hereto hereafter agrees to give proper notice to the President of the local union at the mine by the 18th day of each month that said Operator has made the required

Testimony of Guy B. Darst

payment to the United Mine Workers of America Welfare and Retirement Fund for the previous month."

Had you given notice on the 18th day of May, 1953, or prior thereto?

A. No, I had not. We had not on the 18th of April. We had not on the 18th of March, on back until the last 18th that we had paid welfare.

Q. You admit you had not given notice on the 18th day of May that you had paid it for the previous month?

A. That is correct, we had not paid it.

Q. Immediately after this stoppage occurred on the 18th then you had a meeting with the mine committee, didn't you?

A. No. What do you mean by "immediately afterwards"?

Q. You met with the mine committee of that local immediately after the 18th day of May, 1953—either on the 18th or 19th of May, 1953—and talked to them about
235 this; didn't you?

A. I may have talked to them individually but there was never any meeting.

Q. And said to them, the members of that mine committee, "I declare, we forget to notify you we had made that payment," or words to that effect?

A. No. They are words they are putting into my mouth.

Q. And immediately you had notified—not immediately but in a few days, you told them that you had made that payment, didn't you; that you had made a payment to the Welfare and Retirement Fund, didn't you?

A. I don't believe so. No, sir. We weren't able to make any payments. We did not make a payment.

Q. As a matter of fact, you did make a payment about that time, isn't that correct, isn't that true?

A. I would have to check the record to find out.

Q. You stated yesterday to his Honor and these men

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that you did not think you had made any payments after January, 1953. I want to ask you now if it is not in this record by stipulation signed by lawyers on both sides, that these payments were made to that welfare fund in the year 1953, and I will give you the dates:

On February 24, 1953, \$4,274.52 on a tonnage of 10,686.3; on March 23—and that payment was just marked "on account," not for any particular period—on March 23, 1953, you made another payment marked "for February, 1953" on 7,160.5 tons in the amount of \$2,864.20.

A. Excuse me, just a minute. What was the first one marked for?

Q. On account. You were in arrears on the welfare fund and at that time you made two payments, two cover the current month and also paid some on the old account.

A. What I think I must have had in mind when I said no more payments were made after January, I thought about this later, it might have been that the payments were made later but applied against those tonnages. The tonnages for those months.

Q. I will ask you if on May 1, 1953, you did not send this welfare fund a check for \$2,661.56 and marked it "paid for March, 1953"?

A. That could very well be.

Q. Then you were wrong yesterday when you said you made no payments after March, 1953?

A. That payment was for March, was it not?

Q. Yes sir.

A. Well, that is why I probably made that statement yesterday. You have got the record there and I should have said yesterday that the record will bear out the payments.

Q. I will ask you if this payment dated May 1, 1953, you did not send, during that period of time to the

Testimony of Guy B. Darst

237 welfare people, during that period of time when the shutdown occurred and as soon as that reached them, and in accord with the contract, the men went back to work, isn't that true?

A. I don't think welfare had anything to do with it. If you will notice from the dates that you read from that record that they were not sent in on the 18th and they were received at various times during the month.

We were making the payments when and as we could afford to make them, and we were not reporting each 18th of the month whether or not the payments had been made.

Q. In other words, you are not living up to the portion of the contract under which you agreed to give notice, proper notice to the local union at the mine on the 18th day of each month that you had made the required payment?

A. When we did not make it we didn't report it, and when we couldn't afford to pay it we did not report that it had been paid.

Q. And did you report anything before that work stoppage on that?

A. I did not get the question.

Q. Did you report anything to the men, the committee of the mine or anybody else of that local—this is the mine committee and the local, not the International or District—and did you report to anybody in the local before May 18th,

1953 about not making the payment or making it
238 or anything else?

A. No, neither did we in April or March, and the reason being, the reason for the strike—

Q. I am not asking you about April or March but I am talking about May when the work stoppage—

A. All right, I am talking about the work stoppage.

Q. You did not do it in March; you did not do it in April?

Testimony of Guy B. Darst

A. No.

Q. The men went on working for you just the same?

A. Exactly.

Q. And the third months you didn't do it, finally came to the place of the third month of violation and the men quit, is that right?

A. The Benedict local—

Q. Answer that yes or no and you may explain. That is right, isn't it?

A. We had not reported it from, whenever the time was, we could not make the payments on it. The fact that the 18th of May—why did they strike on the 18th of May before I would have a chance to at 7 o'clock in the morning, to tell them on the 18th of May that the payment had been or had not been sent in? I ask you that question, Mr. Kramer.

Q. Well, of course, you are not the attorney and I
239 will not answer it. I don't think the Court would rule I should.

A. All right.

Q. But I want to again read to you what the contract provided that you were a party to.

“By the 18th” of May to make the report, and you hadn't made any?

A. That is correct.

Q. But after this question arose you did make the payment and the men went back to work?

A. Whether we made a payment or not had nothing to do with that strike. The men struck before the 18th occurred.

Q. I want to call your attention to one other provision of the agreement—the 1950 Agreement, Exhibit No. 2, your Honor, as effective March 5th, 1950—and I wish you would turn to page 5 of that Agreement and read to the jury the first full paragraph on page 5, please. Read it, please,

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then you may make your explanation. Beginning with the word "failure."

The Court: "Failure of any operator——"

Mr. Kramer: Yes, sir.

The Witness: I did not get the paragraph?

By Mr. Kramer:

Q. First full paragraph on page 5 beginning with the word "failure" up near the top.

240 A. Oh, yes. I was looking under caption.

Q. The captions are over on the preceding page somewhere. Read that please, to the Court and jury.

A. "Failure of any Operator signatory hereto to make full and prompt payments to the 'United Mine Workers of America Welfare and Retirement Fund of 1950' in the manner and on the dates herein provided shall, at the option of the United Mine Workers of America, be deemed a violation of this Agreement. This obligation of each Operator signatory hereto, which is several and not joint, to so pay such sums shall be a direct and continuing obligation of said Operator during the life of this Agreement and it shall be deemed a violation of this Agreement if any mine to which this Agreement is applicable shall be sold, leased, sub-leased, assigned, or otherwise disposed of for the purpose of avoiding the obligation hereunder."

That may be well and good, but I maintain this strike was not over——

Q. I didn't ask you to comment on it, Mr. Darst.

On the morning that this close down or stoppage occurred on May 18, 1953, did you talk to Mr. Muncey, a member of the mine committee, I believe it was in the commissary or near the commissary somewhere, around your place of business there?

A. No, sir, I did not. Are you talking about the 18th?

241 Q. I am, the first day of this stoppage?

A. No, sir.

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Q. It was on the 18th?

A. I might have seen Mr. Muncey on the 19th or 20th, something like that, but I don't think on the 18th.

Q. Did you say to him, or to someone else in his presence there, "Well, I declare, we forgot to get that in," or "Somebody forgot to get that in"?

A. Not on the 18th and I did not make it at any later date.

Q. You did not make that statement on the 18th?

A. No, sir. At that time and on the 18th the strike was purely and simply over the refusal of the Big Mountain employees to join the Benedict local.

Q. I understand that is what you are saying, but I am asking you if there was not involved in this the question of the failure to pay the welfare fund?

A. No, sir, it was not involved.

Q. Now Big Mountain did not operate on the day of the 18th, did they?

A. No, sir.

Q. They did operate on the 19th and the 20th, and whatever day it was, it was colored there through the 27th?

A. No, sir, they did not operate at all during that time.

242 Q. You are saying now the Big Mountain did not operate any time during the period of May 18 through the 27th?

A. No, sir. They produced no coal during that period. On the morning of the 18th the men of the Big Mountain Company were prevented from going to work by a number of Benedict employees.

Q. Were you down and saw anything like that?

A. Yes, sir. They were still there when I got there about 8 o'clock.

Q. Did you see them turn back anybody from the Big Mountain operation?

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A. No, sir, but I have read an affidavit to that.

Q. What you are basing that on is hearsay, and let's stay with what is within the law. You did not see anybody turned back who wanted to go to Big Mountain?

A. Myself, personally?

Q. Yes, sir, yourself?

A. No, sir.

Q. You did not see anything like that?

A. I didn't see it that particular morning. I had seen before.

Q. Did you see it on the 19th?

A. No, there was no attempt to work.

Q. Did you see it on the 20th?

A. No attempt to work.

243 Q. Did you see anybody turned back from Big Mountain—I am asking you about the operation on either 18th, 19th or 20th?

A. No, sir.

Q. Now these men at your mine did not come to work on the 18th or 19th, and what word did you get on the 19th about the men being ready to come back to work on the 20th?

A. I got no word on the 19th.

Q. You got word on the 20th they were ready to come back to work, didn't you?

A. I may have on the 20th.

Q. As a matter of fact, the men came out there on May 20th dressed in their work clothes at shift time ready to go to work, didn't they?

A. No, sir.

Q. And you had turned off the light that you had there indicating—red meaning no work, green meaning work, and on the morning of the 20th you had the red light, whatever type it was, turned on telling the men not to come to work, or no work for them on the 20th, didn't you?

— A —

Testimony of Guy B. Darst

A. I believe you are right about that. I didn't do the turning of the work sign on or off, but it was turned on to no work by the 20th because we weren't—

Q. I am not asking you for a reason, but you so kept it turned off until the 27th, didn't you?

244 A. That is correct.

Q. So that you had put up the sign and kept the men off the job, regardless of what may have been the reason for it, from May 20th through May 27th?

A. I want to correct that just a minute. The sign was neither turned to no work or work, I believe Mr. Kramer, after that.

Q. You don't think it was turned at all?

A. Either way, no, sir.

By the Court:

Q. I did not get the reason why they did not go back to work on the 20th if they wanted to go back to work.

A. Benedict no longer had orders, which I testified to yesterday, to make the boat, the shipment to the boat compartment on the Great Lakes.

By Mr. Kramer:

Q. In other words, there was no strike then after May 20th, after May 19th? In other words, between May 19th and May 27th you simply had no work for them, is that not right?

A. If you want to put it that way. We did not have business that we had at that time.

Q. You received a letter from Mr. Allen Condra, the President of District No. 28, stating to you just a couple of days after this that you had posted a notice they
245 should not go to work, didn't you?

A. I may have. Do you have a copy.

Q. I want to show you what purports to be a photo-static copy, unsigned except the typed signature. You received that letter didn't you?

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A. That's right, I got this letter.

Q. Do you want to change your answer in view of that letter about not posting any notice or turning on the sign that there was no work?

A. Not necessarily. My answer still holds good.

Mr. Kramer: I want to read and then file as Exhibit No. 16 this letter.

"May 26, 1953.

"Mr. Guy Darst, Vice-President,

"Benedict Coal Corporation,

"St. Charles, Virginia.

"Dear Mr. Darst:

"This being the first day that I have been in my office since your letter was mailed on May 20, I am now taking this opportunity of answering same.

"May I remind you, Mr. Darst, that on Tuesday, May 19, your employees voted to return to work and so advised the Mine Management through the Representative of the Local Union. On that same day, May 19, you posted a notice that the mine would not work on Wednesday, May 20.

246 "Your employees have stood ready and are now ready to resume operation at any time that you see fit to put the mine in operation."

(Exhibit No. 16 was filed.)

By Mr. Kramer:

Q. Now, the letter that was written on May 20th was the letter that your attorney filed yesterday addressed by you to Mr. John L. Lewis, wasn't it?

A. That's right, with a copy to Mr. Condra.

Q. With a copy going to Mr. Condra.

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A. That is right.

Q. And this letter which I now have, a photostatic copy and filed as Exhibit No. 16, is the reply to the letter written by you to Mr. Lewis?

A. That is correct, and that it does not indicate that the light was not turned completely off.

Q. No, it doesn't say just 99.9 percent, but it says that what it does say.

A. You asked me if I wanted to change my answer a minute ago.

Q. Now this other letter which was written by you on May 20—

A. That is correct.

Q. —in which you said, the Lewis letter, "This letter is to advise you that this company has been operating under and living up to its contract with the
247 United Mine Workers of America." You hadn't been, had you; you hadn't been paying the welfare?

A. We had not been paying it on the 18th, no, sir.

Q. You knew at the very time you wrote that letter on May 20th your men were standing by ready to go to work, didn't you, and yet you wrote that letter?

A. The letter was written and mailed on the morning of the 20th, and I think the postman comes about 10.

Q. You knew at that time that the men had been down there that morning in their work clothes ready to go to work.

A. They did not report to work that morning.

Q. Because the sign was not up to come in. Did you answer the letter of Mr. Condra and call his attention that he made a mistake, that he was wrong when he said his men were standing there ready to go to work on May 20th?

A. They went back to work on the 28th and I probably got that letter the day after he wrote it, on the 27th. There was no need to answer his letter.

Testimony of Guy B. Darst

Q. But you did not write and say his men were not ready to go to work, did you?

A. No.

Mr. Kramer: May it please the Court, I do not want to close the door because I have had no opportunity to study this damage claim as proven. I want to ask a few
248 questions so I can study it tonight and withhold questions on that because it would be——

The Court: We are not withholding much farther examination: This gentleman has been on the stand two days and I am expecting an end.

Mr. Kramer: Yes, but your Honor, of course, they put in these figures for the first time——

The Court: I understand that.

Mr. Kramer: And we have not had a chance to analyze them.

The Court: They are on the board, and go ahead and analyze them.

Mr. Kramer: I would like to call the Court's attention to this. We took pre-trials and we asked for the manner of computing damages.

Now I do not want to say something your Honor thinks I shouldn't say in the presence of the jury. I have the answer to those questions but that does not prepare me for cross-examination on this, but for reasons I will be glad to show you——

The Court: Go ahead with the witness.

By Mr. Kramer:

Q. Mr. Darst, on this first item—you have on this Exhibit No. 8, you have across the board a series of six columns, the first one indicating the date of the strike
249 which, of course, I understand.

I do not have any understanding of this second column nor have I received any books that were promised to me this morning under which I can even examine them

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to see them. I have not even had a chance to see the books on that which I want, but this actual price which you show, or actual cost, pardon me, per ton of \$6.397—

The Court: Just a minute. Why haven't the books been turned over to Mr. Kramer? Have they been retained and been refused to him?

Mr. Winston: These books have been here all day.

The Court: He is saying to the witness that the books were not turned over to him.

Mr. Winston: I understood he wanted them tonight.

(The colloquy of the Court and counsel is omitted on this point.)

Mr. Kramer: The only thing I am asking is to study them tonight and recall him in the morning.

The Court: You are granted that permission. See that he gets the books.

By Mr. Kramer:

Q. Now, the second column, which is the actual cost per ton of \$6.397, how did you arrive at that item?

A. The books are closed each month and all costs of labor, supplies, power—every item is closed out for
250 that particular month, in so many thousand dollars.

An inventory is taken at the end of each month. In case there happens to be a bin full of coal at the tipple that has not been loaded in railroad cars or standing railroad cars, the total number of tons is divided into the total number of dollar costs to get that figure right there, and to help you I will be glad to show you in the books when you get them.

Q. I will ask you this evening. The thing I wanted to know, that is, generally, what you said this morning, but suppose you ordered a lot of supplies of one type or another, I don't care whether oil, machine parts, books, or anything else, that you would not use in that month, and I assume you order those in substantial quantities to get

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the best price on them. Does all the cost of that particular item go in that month's costs or just the items you use in that month, or how do you know what to put in as a part of, say, supplies or parts or things of that sort?

A. At that time supplies, mainly timbers and powder and repair parts, were not too hard to get, and while some items may be carried over from one month into the next you will find on examining the books the supply costs did not vary but a few cents a ton.

Q. You use mine props?

A. Yes.

251 Q. Ties and nails. If you bought a quantity of nails during that month, and you bought a quantity of ties and a quantity of props during that month, the entire cost of those nails, ties and props were all put in as a cost of supplies for that month and are all used that month; you don't take six months to use them?

A. That's right. We ordered generally at the rate of—we order generally at the rate that we were using them.

In other words, we had a truckload that come in every four days—a truck every four days of props, or two, whatever it is. It was kind of a scheduled thing.

Q. What did you do with things like cars you used. Suppose you got some new mine cars in during that month, is the cost of those mine cars in there?

A. No. That is an item that would go in plant and equipment, a capital account.

Q. Is there an amortization or depreciation of—

A. Depreciation charge.

Q. And is that added in?

A. That is added into that, yes. That is a fixed overhead charge.

Q. And is that the same rate of depreciation, amortization or depletion, and possibly all three, you use for income tax purposes?

Testimony of Guy B. Darst

A. That is correct.

252 Q. That is the figure used there?

A. Yes.

Q. And your books so show?

A. Yes. It varies per ton because it is a fixed charge per month.

Q. It is uniform so long as you don't add a capital expenditure, and when you add that it is increased by the amount of the new items.

A. The rate is fixed by the capital expenditures. Say we bought \$2,000 worth of stuff. We would be permitted to extend the depreciation rate in the month by the tax people.

Q. Did you add in that depreciation an accelerated depreciation for depletion and amortization?

A. No, the rate has been standard over the years.

Q. Did you add in there overhead?

A. Yes, sir, the fixed overhead.

Q. What do you mean by "fixed overhead"?

A. The people who are on salaries.

Q. Like you and the bookkeepers?

A. The office force.

Q. Are you on salary?

A. That's right. That is people who are used in keeping the mines dry and keeping the mines ventilated and keeping the mines safe; that is depreciation; that is
253 power; that is insurance and taxes, and so forth and so on. I can show you how we list them.

Q. Go to the next column which you have there, the per ton cost if produced not lost—or do we mean if production not lost?

A. That is right.

Q. That means production. How do you arrive at that figure in the third column of \$6.240 for the first item?

A. That is the saving in the overhead cost that the in-

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creased tonnage would make. If I had a piece of chalk I think I could——

Q. You say the actual cost is \$6.397 but if you could have operated during the days that you claim, commencing, or April 14 and 17, that would only cost \$6.24 a ton, is that the idea?

A. Yes, sir.

Q. Let's jump down and get another one. Take January, 1951, where you have a difference also of some two dollars, a little less, one-eighty on that. How do you figure the number of days you would have operated in that month in order to get the figures in the third column? You figure you would have had orders to operate every day?

A. If the week preceding in the month we are operating full time, five days a week, and we lose time on a strike right in the middle of that time, we figure we could
254 have run those two days.

Q. In other words, to get at this you had to figure on operating the full, normal work days during that month, didn't you? You had to figure this month two days out because of the trouble. I am only talking about the five-day week, and in that five-day week, this particular month you had 23 work days, right?

A. That is correct.

Q. Five in each one and three here (indicating).

A. That is correct.

Q. Now then you figure you would have had orders to operate all 23 days, but you did not have them, did you?

A. No, I am not saying that. I am saying that we ran five days in the week preceding and five days in the week following. We assume—we don't assume, we know we could have run and produced and sold the coal in the middle, in the middle when the strike occurred.

Q. Do you have orders—I am going to the same month—did you have orders in January for the month of January,

Testimony of Guy B. Darst

1952, to be filled during the month of January, 1952, which would have kept you operating every day, every work day that month, if that trouble had not occurred?

A. Not necessarily, just like I explained a minute ago.

255 Q. Then you don't know whether you could have worked every day and yet you figured this third column as if you had orders to work every day during that month.

A. We know we could have run those two days that the strike occurred.

Q. I realize that, but you don't know that you could have run every day that month of January, 1952, and when I say every day I still mean work days, do you?

A. No. That is what I say, we are assuming only the week before and the week after.

Q. In other words, you did not take 10 days to get the average for January, but you took the whole month although you didn't know whether you could operate or not?

A. For instance. Say we go—

Q. Isn't that right, then explain.

A. I did not understand your question.

Q. I am asking you that what you actually took was this week and this week, first and second weeks in January, 1951, to get an average and then assumed that that was correct for all the work days during that month?

A. No, sir. I took the number of work days worked by the total tonnage and got an average for the work days worked. I added the value for two average work days to the tonnage actually produced and divided it into the overhead costs for that month.

256 Q. And the books that I am going to have access to tonight will show me then, according to that statement, the exact number of tons in January, 1951, that were actually produced during all of the work days in January, 1951?

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A. Yes, sir, and also show you how many days were worked by months.

Q. And then you took and divided the actual tonnage of all work days during that month and divided it by the number of days worked?

A. I took the number of days worked in which coal was produced and divided them into the number of tons that were produced.

Q. All right. Now but I didn't understand what you meant when you told a few minutes ago you took the week before and the week of the work stoppage and used those days, did I misunderstand you?

A. Maybe not. Maybe I did not make myself clear.

Q. Tell us what it was in your own language so I will know when I look at the books.

A. For instance, we worked the week preceding—I can't see from here the dates.

Q. Let me take one that you can see. I am going to jump over to February, 1952. This was January of 1952 here and this is February of 1952 here. Explain to us about how you got these figures you used for the so called Campbell strike—and, incidentally, I notice you got
257 a half-day on the 7th which is not included I assume, but let's forget that for the moment. Let's take this and tell me about it again.

A. For that strike and for the last week in January—I don't believe it is a whole week, is it?

Q. No.

A. Can I come over there?

The Court: Yes.

A. (Continuing) I might be able to show you a little better.

We were working full time this week before, the week the strike occurred, and we were working full time the week after. The same thing for the others.

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Q. Stay with the same one.

A. And when we worked five days the preceding week and five days the following week, it was safe to assume we would have worked five days the week in which the strike occurred. That was the way these strikes were figured.

Q. Just tell me what you did with those five days before and five days after.

A. We add them to the rest of the days of the month that were worked.

In other words, if we had worked seventeen days in January and we were off two, we added two days, and we might have missed some time in the latter part of the month.

258 Q. Let's get back where we were. Let's take this February, 1952. You took and added up the number of tons produced throughout the entire month. You took that and divided it by the actual number of days you worked during this month.

A. To get the average day's production.

Q. And from that you got the average day's production in tons?

A. Right.

Q. What did you say then about—the orders, to get the figure over here?

A. Then where we had a strike that reduced your work time, which we knew we could have worked because we had full time on both sides of the strike, and we added in the average day's production.

Q. If one day you added one additional day to it; two days you added two additional days?

A. That's right.

Q. And divided by the number of days of—

A. Well, then, we divided the total number of tons with the strike tonnage lost added in, the larger number of

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tons, into the fixed overhead. More tons makes the overhead cheaper.

Q. This figure in the fourth column is the difference between these two and the third column arrived at in 259 the manner you now told us. I think I understand what you have.

A. That's right.

Q. Then you multiply not by the number of tons produced but by the number of tons produced plus what?

A. The number of tons lost. In other words, we would have had a cheaper cost on an increased tonnage.

Q. And then that was where you got this total here?

A. Yes, sir.

Q. I understand it. I understand also your method except this item here of \$21,000.00, and I don't understand where you got that item, because what you have told us about these others items, about what you explained. Explain how it operates. I do not understand how you got this item which you have added as "other loss due to abandonment of construction," which you have for \$21,534.85?

A. That is the amount of money paid to M. M. Campbell, contractor, for labor and the amount of money also for supplies and materials that we had to buy in the construction of the aerial tramway, slate disposal. The books, incidentally, well, the main books, the ledger, will disclose that.

Q. The books you have up here will not disclose that, but you say you have books available that will show it?

A. You are welcome to take—

Q. You can point them out to me after Court.

A. I have not carried them up here until we need them.

260 Mr. Kramer: I want to reserve, your Honor, as I indicated before questions on those books.

The Court: And I suggest, gentlemen, you pick out the pertinent books for Mr. Kramer so he will not have to go

Testimony of Guy B. Darst

through five or six hundred pounds of books. In other words, make it easy for him, easy as possible, and give him what he wants.

The Witness: Will be glad to do that.

The Court: All right.

By Mr. Kramer:

Q. I do want to ask one more question before I dismiss him.

In figuring overhead, have you figured such item as dues in the Virginia Association—you know what I mean?

A. I know what you mean. That is what we have put in a general expense item. I don't think it will be shown as such in these columns, for the time we belonged to that.

Q. Is there a place I can find that?

A. The main books will disclose it again.

Q. Is such items as welfare fund included?

A. No, sir. Welfare fund is a per ton thing and we have only picked up the static overhead—vacation pay, which goes on whether the men work or not is in that.

Q. The vacation pay of \$100.00 a year is allocated on a weekly basis in your book setup?

261 A. A monthly basis. \$8.33 per month per man.

Mr. Kramer: All right. That is all for now.

Redirect Examination, by Mr. Winston.

Q. Mr. Kramer was asking you about that water strike and brought out the fact the company maintains houses and rents them to the men. How much rent do you charge the men for those houses?

Mr. Kramer: We object as irrelevant, your Honor.

The Court: What is the relevancy of that?

Mr. Winston: Well, sir, actually, an amount over in addition of the wages, additional consideration.

The Court: Sir?

Mr. Winston: I want to show that the company is not trying to mistreat these people.

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Mr. Kramer: I am not claiming the company is trying to mistreat them.

The Court: He says he is not claiming they were trying to mistreat them.

Mr. Winston: About that water situation.. I do not want the inference to get over that the company was——

The Court: I will let him answer since he went into it. By Mr. Winston:

Q. How much rent do you charge them?

262 A. We get \$8.00 a month for a four-room house and \$10.00 a month for a five-room house.

Q. And you also furnish water?

A. Furnished the water free.

Q. Any additional charge for the water in addition to that rent?

A. No, not even when it is piped into the house.

Q. Mr. Kramer also made the statement that nothing had been said about that November 6th election date.

I will ask you to read on page 66 of your pre-trial discovery, this question——

Mr. Kramer: I object to that. I don't think I made that statement. I said in this trial there has been nothing said. It was made in the pre-trial deposition. In this present case yesterday and today it was not mentioned.

The Court: Gentlemen, I don't think those are matters——

Mr. Winston: We want to show we have showed our position.

Mr. Kramer: It was in the pre-trial, yes, I have admitted that.

By Mr. Winston:

Q. Now, sir, Mr. Kramer asked you about the terms of the contract you had with Mr. Campbell. I believe
263 you stated it was mutually agreed he would cease work?

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A. That's right.

Q. Tell the Court and jury why you agreed for him to cease work, what motivated you?

A. It was keeping the labor situation and the men at Benedict upset continuously. We had several other very short half-day strikes during the period Mr. Campbell was there. Mr. Campbell's men and the Benedict men just did not get along at all.

Mr. Campbell's men were not permitted to join the local union after he went and signed a contract. The Benedict men kept agitating and holding out for Benedict laid-off coal miners to be worked by Mr. Campbell and the work was very intermittent as I testified yesterday. He worked a while and would lay off a week, work a week and lay off a week, or work a month and lay off a month, trying to keep down a dispute. The disturbing factor was there.

Q. That is the reason you terminated, you mutually agreed with Mr. Campbell?

A. Yes. I agreed and he agreed. We stopped the operation.

Mr. Winston: That is all.

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Recross-Examination,

By Mr. Kramer:

Q. In fact, those stoppings and startings of the Campbell operation, a lot of those were due to delays in getting materials and things of that sort?

A. No, sir.

Q. Never?

A. Never. Materials weren't hard to get at that time.

Q. And you say all of his stopping and interruptions there were due to his trouble with his men and disputes of that sort?

A. Trouble between his men and Benedict men.

Q. And him and his men, too?

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A. Not necessarily. I didn't know too much about trouble between he and his men.

Q. You made one other statement I did not get the significance of. You said his men were not permitted to join the United Mine Workers after he signed the contract, is that what you mean?

A. That is correct.

Mr. Kramer: That is all.

(Witness excused.)

The Court: Take a short recess, gentlemen.

(A short recess was had.)

The Court: All right, gentlemen, you may proceed.

265

M. M. CAMPBELL,

called as a witness by and on behalf of the defendant-cross plaintiff, after having been first duly sworn, was examined and testified as follows:

Direct Examination,

By Mr. Milligan:

Q. Your name is M. M. Campbell.

A. Yes, sir.

Q. Where do you live?

A. Charleston, West Virginia.

Q. How old are you?

A. Fifty-seven.

Q. What is your occupation?

A. Well, I have always been in the carpenter and contracting business.

Q. Do you know Mr. Guy Darst, this gentleman sitting at the end of the table?

A. Yes, sir.

Q. When did you first meet him?

A. In August, 1951.

Q. How did you happen to come in contact with him?

Testimony of M. M. Campbell

A. Through a bulldozer operator by the name of Woodrow Turner.

Q. What information did you gain that caused you to meet Mr. Darst?

266 A. Mr. Turner told me that Mr. Darst wanted to build an aerial tramway for the disposal of slate.

Q. And as a result of that did you go to see Mr. Darst?

A. Yes, sir.

Q. And did you negotiate with him for the construction of that aerial tramway? You discussed it?

A. Well, yes, sure. I told him my business there the first time and I was a building of such construction and discussed the job.

Q. Anyway, after discussing it you did come to an agreement, is that correct?

A. Well, after I went up there I would say two or three times.

Q. I wish you would explain to the Court and jury what an aerial tramway is, and I would like to know so we will know what we are talking about.

* A. The aerial tramway is a suspension of rope stretched to different lengths. The rope would be, oh, about an inch and 3/16th that goes over intermediate towers to the next mountain, and buckets load out of a bin and turn off and move out there anywhere from 1,400, 1,600, maybe 2,400, and automatically dump and come back and get another load of dirt.

Q. In other words, it was just a conveyor to carry slate or coal, whatever you put in this bucket, across a
267 valley or a ravine from one mountain to another?

A. Yes, sir, and dump it anywhere on the line you set the automatic control.

Q. Of course, this would require some kind of supporting towers, I believe you said?

A. Yes. It would require two anchors and two towers,

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an intermediate tower, that is a metal tower, and a tower which is made out of an A-frame.

Q. This rope is one and 5/8th, did you say?

A. One and three-quarters.

Q. That means in diameter?

A. In diameter, yes, sir. 6-19, that means six strands, 19 wires per strand.

Q. How much weight would be imposed on that rope aside from the weight of the rope itself; that is, what would the loaded bucket weigh?

A. We figured on carrying about a yard, I would say about a yard and a quarter of dirt, which would—

Q. Weigh four or five thousand pounds?

A. Yes. It would run about a ton and a quarter, maybe a ton and a half plus the weight of the bucket.

Q. Are those ropes expensive?

A. Well, I couldn't give you the dollars and cents. I haven't rented any of this rope for about four years. I haven't bought any but I would say at that time
268 this rope, which was a new rope, would cost approximately \$3.00 per foot. That is as near as I could get to it.

Q. Do you know how long this rope was?

A. 2,400 feet.

Q. As a result of your conference with Mr. Darst, did you go to work?

A. Yes, sir. After I went back about the third time, I think on the 11th day of August, we come to an agreement.

Q. Did you enter into a contract?

A. We written a contract. Mr. Dick Rains, I believe, one of his own hands, Mr. Darst and I dictated a contract, wrote it in longhand, both of us signed it and Mr. Rains notarized the one copy, then we agreed to let Mr. Dick Rains keep the one copy until he could type it out and

Testimony of M. M. Campbell

give each one of us a copy, and we resigned each copy of that and kept it, and I don't know what we did with the longhand contract.

Q. I hand you what purports to be a contract written on the stationery of the Benedict Coal Corporation which has been filed as Exhibit No. 4 in this case and bearing the signature of Guy B. Darst, vice-president of the Benedict Coal Corporation, by Guy B. Darst, and M. M. Campbell, contractor, by a signature. Is that your signature?

A. Yes, sir.

Q. And that is the contract?

A. Yes, sir.

269 Q. And that is the notarization by Dexter Rains that you see there, his notary seal?

A. Yes, sir.

Q. Was that the contract that you were operating under while doing this work for the Benedict Coal Company on this conveyor?

A. Yes, sir. I operated under that contract.

Q. How many men did you have in your employ, approximately?

A. That varied. Sometimes three or four and sometimes maybe six or seven. I aimed to stay at all times under eight, or not over eight, on account of unemployment compensation.

Q. Now who paid the wages of these men?

A. I did all the hiring of whoever I decided I wanted to hire.

Q. Did you have the right to discharge any men that you saw fit to discharge?

A. Yes, sir. I could discharge any time one or all if I had any right of my own to.

Q. Did Mr. Darst have any control over the hiring or firing or reserve any control over them?

A. No, sir. The Benedict Coal Corporation, none of its

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staff, at any time never did have any jurisdiction over who I hired at any time.

Q. He relinquished all control over them when you
270 entered into the contract; in fact, he never had any control?

A. Sir?

Q. Mr. Darst never had any control over your employees or employee selection?

A. No, sir. We did not discuss that and he did not ask any authority.

Q. How long did you work on this until an incident arose in reference to some of the representatives of the United Mine Workers?

A. Well, the first direct trouble that they had there over this contract was in—I couldn't be positive, it was in the first of the year and I couldn't recall positively whether in January or February.

Q. To refresh your recollection was it about the 7th or 8th of February, do you recall?

A. Yes, sir. I had some trouble in February.

The Court: What year?

Mr. Milligan: 1952.

The Witness: Yes, sir, that was 1952.

By Mr. Milligan:

Q. Without going into too much detail, Mr. Campbell, would you state to the Court and jury the nature of that trouble and just how it initially arose. Start at the beginning. I don't mean to go all the way back but just shortly before that date as to what happened.

271 A. You mean what the trouble raised over?

Q. Yes, sir.

A. Well, in the beginning, as I said I had my own employees. I hired them, then I arranged the price. I was paying them. It seems that Mr. Darst in the past had shut down his mine on the hill, which was before I was at

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Benedict. I know nothing about what had shut it down, how many men had worked. I didn't ask him. But the mine workers wanted me to hire the men that they had in their Benedict local and put them on my payroll.

I mean, they were coal miners, all inexperienced construction men, and they said I was doing work there and around the mine and my men should belong to the union.

Mr. Kramer: I object, your Honor, unless it is identified. There is no identification of anyone that it might be.

The Witness: Well, I can name the ones that I meant, of course, "they".

By Mr. Milligan:

Q. Would you name them?

A. One of them was Grant Mullins, a committeeman, and another was called by the name of Scott, another one was a fellow by the name of Lee Ellis, who was president of the Benedict local.

Q. When you say "committeeman" you mean a committee-
272 mitteeman of the Benedict local?

A. Yes, sir. They wanted a grievance.

Q. Those are three you remember?

A. One more on the committee but seemingly I never got very well acquainted with him. Mostly when a grievance come up Mr. Mullins and Mr. Scott and the president of the local, generally.

Q. Mr. Campbell, have you had any experience as an underground miner?

A. Well, I would say—I pretty near have to say yes and no. I have been underground for various companies at various places to do certain pieces of work.

Q. I mean as a miner.

A. No, I am not. I never had any experience as a practical miner.

Q. Referring to your employees, were they trained underground miners, the ones working for you to do this conveyor job?

Testimony of M. M. Campbell

A. Well, if they was they never named it to me. They did not belong to the union at that time.

Q. Were they carpenters and craftsmen of that type?

A. They were good, all-around outside construction men. They did a very good job.

Q. Would a man that was trained to do underground mining be accomplished, that is ordinarily be accomplished, to do the type work that you were doing?

A. Well, in my experience in doing construction work, I don't mean any prejudice against a miner, but a miner that was worked underground for years and the same temperature under there all the time, as I understand, naturally, and to bring him outside in the cold and heat he doesn't make a good man, and otherwise he does not handle tools as good as men that follow around on this outside construction.

Q. Were the men working for you—I don't mean cabinet makers—but were they trained carpenters and construction men?

A. Yes, they were good construction men. About as good as the average you would hire.

Q. You would classify them as skilled workers?

A. Yes, I would.

Q. And you say they were insisting that you let those men go and substitute these men that had been laid off at Benedict?

A. Yes, sir. I had a considerable bit of trouble about that at different times.

Q. Was any pressure brought to bear on you—I won't say force, but to cause you to take them on?

A. I would have to say almost sure. They once pretty near rolled my truck over the hill.

Q. Who?

274 A. I couldn't name these men by group because they were getting ready to go in the pit, and one of

Testimony of M. M. Campbell

them walked up to me and he said, "I am just a damn good notion to roll your truck over the hill."

I said, "Go ahead, I can't stop you."

Mr. Kramer: We object to that sort of testimony because it is not identified with either of the defendants in this lawsuit.

The Court: Yes.

Mr. Milligan: I think he can identify them.

By Mr. Milligan:

Q. Were the men that made these statements to you a part of the Benedict crew?

A. Yes, sir, they were. They worked in the pit and come and went daily.

Q. On their way into the Benedict mine?

A. At 3 o'clock in the evening some come out and some would go in, seemingly to me, and I had to come around up in there because I was dumping my material down over a track, down in there, to build—

Q. What further evidence of this force you spoke of was demonstrated there?

A. Well, sir, I don't know who the boss of these men was, the committee, but seemingly they had a boss somewhere because when they would come to tell me
275 "We are going to strike Mr. Darst's mine and the boss told us we knowed what to do."

Q. When did they tell you they were going to strike Mr. Darst?

A. Well, these men that would handle those grievances, and they never did tell me they were going to strike. That Mr. Scott, most of the time, approached me and he would say, "We are going to blow it out tomorrow."

Q. What were they trying to get you to do aside from employing these men? Did they want you to join—

Mr. Kramer: I object to the leading. Let him testify.

The Court: Yes.

Testimony of M. M. Campbell

A. Well, the idea was to make me sign a UMW contract, which I finally did, as if though I was a coal operator, not a construction worker.

Q. Were you hindered in any way in access to the work by anyone?

A. Well, yes. . .

Q. Just tell the Court and jury about that.

A. I was stopped one morning. Three fellows, I don't know—one of them had worked for me three years before I got connected with this union. I don't know whether he had always belonged or not. If he did he did not say. But they come up there this morning and three of them had shotguns in their car.

276 Mr. Kramer: I object to that because we are not connected with that.

The Court: Lady and gentlemen of the jury, unless you find that people actually came with shotguns, unless you further find that they were members of the local union made up of employees of Benedict, or unless you further find that they were representing the members of the local union or representing the District 28, or representing the International Union, you will not consider this testimony. If you do find those factors to exist, then you may consider the testimony.

By Mr. Milligan:

Q. Mr. Campbell, do you know any of these men?

A. Yes, sir.

Q. Who were they?

A. James Thomas, Fred Thomas, and Charlie Pruitt.

Q. Were they members of the Benedict local?

A. I couldn't say that they were members of the Benedict local, but after the trouble got up—

Q. Well, I didn't ask you about the trouble. Were they employees of Benedict?

A. No, they were in my employ, after the union began to be agitating around.

Testimony of M. M. Campbell

Q. They are your employees?

A. They were mine.

277 Q. Your employees?

A. But at that time they were mixed with the Benedict men.

Q. What Benedict men?

A. The ones that worked in the pit, deep mine.

Q. Do you know the names of any of them?

A. I do know those men had on mine caps, and they come across the track from the mine, and I had seen them there going in and out several times before. These men come from Kentucky with the crew.

Q. What mine are you referring to?

A. No. 5, and the tool house was across the railroad track from the tippie.

Q. Was that where you were going to locate one of the anchors of this conveyor?

A. Well, we always met at the tool house of the morning. All of my employees, and we keep our tools in this house. We would bring them of the evening and go back the next morning and get them. That was a safe place to keep them. That was why we got there.

Q. Was a strike called or a strike at Benedict in February of 1952?

A. Yes, sir.

Q. You say there was a strike in February. Well, had you attended any meetings prior to or shortly prior
278 to that time in reference to the union or your employees joining the union in Mr. Darst's office?

A. Yes. I attended a meeting, I think up at Mr. Darst's office.

Q. When was that?

A. That was in the first, beginning, when they wanted me to sign a UMW contract.

Q. Was it February or January, 1952?

Testimony of M. M. Campbell

A. I believe in January.

Q. 1952?

A. Yes, sir.

Q. What occurred on that occasion?

A. Well, they had a district field worker down there—

Mr. Kramer: I object to that.

The Court: Mr. Campbell, rather than using the word "they," if you can name the parties.

By Mr. Milligan:

Q. First say who was present.

A. Mr. Darst was present, Jim Scott.

Q. Who is Jim Scott?

A. He was a local committeeman.

Q. All, right. Who else?

A. Ellis Lynn.

Q. Who was he?

A. He was present of the local at Benedict.

279 Q. Who else?

A. Mr. Scroggs, a field worker of District 28, were down there.

Q. District 28 was the group that was intermediary between the International Union and the local, was that correct?

A. Sir, I wouldn't know hardly how to answer that question only in my own words and previous experience at different places is about the way I would explain as brief as I could. At all times, and all of my boys with unionism, the districts, has always had—

Mr. Kramer: I object.

The Court: Sustained.

By Mr. Milligan:

Q. I will not ask you to go into that because that will be established by some other witness probably. But Mr. Scroggs was present and he is a representative of District 28. Who else was there?

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A. Dick Rains.

Q. Dick Rains. Who is Dick Rains?

A. Well, he was a bookkeeper, I believe, a bookkeeper or something which worked for Mr. Darst at the mine.

Q. What were you meeting about; what were you there for?

A. Well, they were just discussing with him about
280 claiming my employees, going and taking on of the men that were in the Benedict local.

Q. What if anything was said to you by Jim Scott on that occasion? I will use him to start with. What did he say to you about it? Mr. Scroggs, what was said?

A. Mr. Scroggs told Mr. Scott, "If you don't get what you want, you know what to do."

Q. Told Mr. Scott that?

A. Yes, sir.

Q. Was there anything further said about Benedict?

A. There were several things discussed there, just verbally around, but the main idea was to get me to work Benedict men.

Q. Was anything said about you signing the contract?

A. Yes, sir. They at all times wanted me to sign a UMW contract.

Q. Was there anything said about the Benedict in connection with your signing the contract?

A. Well, yes. It was made very plain by Mr. Scroggs if I didn't sign the contract that—

Q. That what?

Mr. Kramer: Of course, I want it made plain. I don't object to what Mr. Scroggs said but the conclusion.

By Mr. Milligan:

Q. You have repeated what Mr. Scroggs said. You
281 don't have to say the exact words but your best understanding of what he said.

A. Well, if I didn't sign a UMW contract—Mr. Scroggs

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looked at Mr. Jim Scott and said, "If we don't get what we want you know what to do."

Q. What did Scroggs want—he said if you did not get what we want—what did he want?

A. Well, he wanted me to work on a full crew, as many as I could or I needed, of these men that were laid off by the Benedict local, by the Benedict Coal Corporation.

Q. Did you sign the contract?

A. Yes, sir. I finally signed the UMW contract.

Q. Where did you go to sign it?

A. To Norton, Virginia.

Q. At what place?

A. In the office of District 28.

Q. Were the men working at Benedict when you went up to Norton to sign a contract, was the mine closed down?

A. I agreed, that was this evening, to go in the morning with the committeemen and the president of the local to District 28 and sign the contract, and they gave the go ahead sign to work.

Q. When you say "gave the go ahead sign," why was it necessary to give a go ahead sign, were they shut down?

A. Seemingly those committeemen had notified the
282 miners not to work—

Mr. Kramer: I object to the "seemingly."

By Mr. Milligan:

Q. I asked you the question, were they shut down, was Benedict shut down?

A. There were a half-day strike there.

Q. It was shut down?

A. Yes. And would have been shut down the next day if I hadn't agreed to go to Norton to the District office and sign a UMW contract.

Q. Who went up there with you to that office?

A. Ellis Lynn and Grant Mullins, a committeeman.

Q. Did they take you in their car?

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A. No, they rode in my car. They don't have any car and I took my car.

Q. Now when you got there who was there?

A. Mr. Scroggs and Mr. Condra.

Q. Who is Mr. Condra?

A. He is, at that time, was president of the District 28.

Q. Is that the same District Mr. Scroggs was a representative of?

A. Yes, sir. He was working out of that office.

Q. Did Condra have anything to say to you on this occasion?

283. A. Yes, sir. When I walked up the stairway ahead of Mr. Mullins and Mr. Lynn, and I couldn't recall whether Mr. Condra or Mr. Scroggs said, "You finally got him here, did you."

Q. Talking about who, you?

A. Well, I was the one they had. I guess it was me.

Q. Go ahead. What else was said?

A. Well, when I had to discuss the thing—this is pretty rough language but I guess I would have to repeat it as is.

Q. All right.

A. About the best I know how. I agreed to sign a contract, the UMW contract, several pages of it. I did sign it, and the president, Mr. Condra, said, "I had the damn son-of-a-bitch blowed out." That was the Benedict blowed out, if I hadn't signed the contract.

Q. Who said that?

A. Mr. Condra.

Q. And he was the president of—

A. District 28.

Q. Who was he referring to as being blown out?

A. The Benedict Coal Company, Mr. Darst.

Q. What do you mean by blown out, do you know?

Mr. Kramer: Just the language, what he said, not the construction of it. I object to that.

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284 Mr. Milligan: I withdraw that question.

By Mr. Milligan:

Q. And I will ask what in mine parlance the expression "blown out" means; you have been in the mining area for 30-odd years. What does that mean?

A. Well, they say that word rather than sometimes the calling of a strike. It seems to be a slang for the word strike.

Q. In other words, just another expression for strike, is that right?

A. Yes, sir. Sometimes they use—the fellow with more education generally calls it a work stoppage.

Q. Did you have any more strikes?

A. Yes, sir.

Q. First, I want to go back to the contract. Did you sign the contract after it had been completed or did you sign it in blank and let them fill it out?

A. You mean the UMW contract?

Q. Yes.

A. I signed the UMW contract before there was no writing—I mean there was nothing filled in on it. I just signed it blank.

Well, I don't know why. They might not have had a stenographer or typist there to fill it in that day, but I signed it blank and they went ahead and filled it
285 out with what they wanted and mailed it back to me.

Q. Did that solve your problem after you signed or did you have any further problems?

A. In one way it solved some problems. They seemed to be very well satisfied I was a coal operator and sawing wood.

Q. Did it make any problem in connection with your rates of pay to your employees?

Mr. Kramer: I object to that, your Honor. I do not see

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any materiality with that. It is not a lawsuit on his rates of pay.

The Court: Overruled. It shows the whole picture.

By Mr. Milligan:

Q. Go ahead, Mr. Campbell.

A. Yes, it would have changed the rates of pay until I would have had to quit my contract, and did.

Q. And did?

A. And the men that was working for me in my employment was very sore and didn't feel they should be laid off and I would have to work the Benedict men; otherwise, that just throwed them out of a job and I would have to pick up men I never worked and they were coal miners and put them in my employ because I had already been signed a UMW contract.

Q. Did that cause you any trouble with your labor force?

A. Yes, sir. My men went ahead working. They all needed to work very bad seemingly.

286 And then more trouble come up because I didn't have these men that—you see, in talking about laying off—maybe I could explain it better. The mine on the hill seemed to work out before ever I went to Benedict, and otherwise the job was completed, and it was completed, didn't need these men any longer unless they could get another mine opened up.

They were still in the Benedict local and they were on what they called a panel. I don't know nothing about what a panel is, but when I went there and went to building this construction work, to build this aerial tramway for garbage gob disposal or slate disposal—gob, that is another slang for waste in a mine—that they wanted me to work these men the Benedict Coal Company had laid off where they had worked the mine out and did not have work for these men.

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Mr. Kramer: Of course, your Honor, I am continuing my objection to "that they wanted me to work these men."

The Court: Yes.

The Witness: I am using words but I can each time name each man, be the same men.

By Mr. Milligan:

Q. Suppose you do.

A. That would be Mr. Scott, Mr. Grant Mullins, and each time Mr. Mullins and Mr. Scott would see me
287 they would say—I would have to use it this way because they were talking to me—"The boss sent us here to shut you down if you don't do something."

Q. Did you ever take these coal miners on your payroll?

A. No, sir, I did not. I couldn't use them. I wasn't hardly making enough money to pay the men I already had and I couldn't have used any more than I already had on my payroll.

Q. Did you have any other blow outs or strikes or work stoppages, whichever you may call it, at a later date?

A. Yes, sir.

Q. Do you remember when that was?

A. We were shut down, we worked the first of April and shut down but did not work a little more until up in June.

Q. Just a minute. According to the evidence here it looks like it was —.

Mr. Kramer: Now just a minute. I object. That evidence is not about his shutdown at all. That evidence, Mr. Milligan, is about alleged shutdowns at Benedict.

By Mr. Milligan:

Q. Then I will ask you whether or not you recall there was a shutdown or strike on the 24th and 25th of April, 1952, at the Benedict Company?

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A. May I explain one word?

Q. Just a minute. Answer that question. Do you
288 remember that occasion?

A. Sir?

Q. Do you remember when Benedict was struck on April
24th and 25th, 1952?

A. Yes. There was a time or two there was strikes there.

Q. Do you remember that particular occasion?

A. I couldn't recall but I do know there was a two-day
strike when somebody let a locomotive get over the hill.

Q. I am not talking about that, but was there a
strike—

Mr. Kramer: Talking about his locomotive or some-
thing else?

By Mr. Milligan:

Q. You are talking about the Benedict Coal Company.
That did not have anything to do with it. What I am
questioning you, was there a strike, a strike at Benedict
and also were you shut down after you had signed the
union contract?

A. Oh, yes.

Q. Were you picketed; was the approach to your opera-
tion of work picketed?

A. Well, I pretty near have to say yes on that. When
they threatened to roll the truck over the hill, that is what
I call picketing.

Q. That was up there early in the game, but I mean
along later, was there any picketing then?

289 A. None but those 30 down at our tool house.

Q. Did they interfere with your men going to their
work?

A. I don't know whether they were—they did not go to
work. They sure left there.

Q. Was that after you had signed the union contract?

A. Yes, sir.

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Q. Was that along in April, 1952, or do you remember the date?

A. I couldn't call the exact date on that. It has been four years ago.

Q. How long were your men kept away from the work, or if they were not kept away, how long did they stay away on this occasion?

A. Well, I kind of got them rounded up, and on this, after they met down there, that bunch of them, what caused this—I might be able to tell you unless you want to ask me about it or anybody else.

Q. Go ahead, tell me.

A. And what caused that was that after I signed the UMW contract and in which my employees, they were questioning some of them was not miners—I mean, they wasn't in the local—and on a Saturday along about this time they wanted my men to come down—phoned 290 • me to bring my men down—Mr. Scott alone said that—Mr. Scott, Mr. Mullins, Grant, and Ellis Lynn, Mr. Ellis Lynn wanted me to take my men down to the local to join.

And we did not work that Saturday morning. Sometimes we did work half a day on Saturdays, and I got all my boys together and took my car and loaded the ones that did not belong to the local—some had cards they had never presented, but they had, but it had no effect on my job because at that time I was not affiliated with the union, it was construction work, and when I took the boys down to the local at St. Charles to join the local on that Saturday morning, the local would not take them in.

Q. Do you know why?

A. Because they said that local had men laid off.

Q. At that time you had signed the union contract?

A. Yes, sir.

Q. What was the argument over on that occasion? Why would they not take these men in?

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A. Well, you see, I was not allowed in the Hall and I don't know the arguments in the Hall.

Q. Did they ever take them into the local?

A. No, sir, not the regular ones that had been working for me before I signed this contract. There was some of them that did not belong to a union, but after I signed the UMW and Mr. Mullins, Mr. Scott, Mr. Lynn—

291 there was one committeeman, I don't know what shift he worked on, it might have been so he could see me—but these three men always contacted me and handled the business.

Q. How long did you continue to work there after that occurrence in April; when did you finally quit that job?

A. Well, we quit in August. Mr. Darst and I, the trouble got so great, going to shut his mine on account of my construction, he couldn't run—

Mr. Kramer: I object to that as hearsay.

The Court: Well, you can just testify to what you know, Mr. Campbell, but you can give the reason why you discontinued working.

By Mr. Milligan:

Q. Why did you make that statement?

A. I was trying to explain why I had to leave the Benedict Coal Company.

Q. That's right, that is the question.

A. I wanted to finish my job very much there because Mr. Darst—the \$12,500.00 contract had run out. We had used up all that money and then the various trouble, and Mr. Darst had agreed verbally with me in the office before Dick Rains, I believe, to pay me 25 percent plus costs, and that was very interesting to me to get this job completed. I would draw my 25 percent contract.

292 This trouble got so great and pressure so much on me about my men that I had to quit; I had to leave the job.

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Q. And so far as you know, at least during your connection with it, it was not completed?

A. No, sir, and the best of my judgment, and the fact, I could pretty near know it wasn't finished because there was certain particular details someone would have to contact me on to finish the job on changed plans.

Q. When you left there where was this rope we have asked you about?

A. This rope was strung along on the ground, the full length of it, and laid up on forms. Maybe 18 inches off the ground, maybe, just enough to hold it up off of the moisture of the ground until we could get a time to anchor one end and anchor the other end with the take-up block. It was ready for that when I quit.

Q. You don't know what happened to it, of course?

A. No.

Q. Assume that it was burned up or destroyed by a fire. If it had been put up in its proper place would it have been burned by a forest fire?

A. No. The rope, if it had been put up and stretched like it should have been, even if it had never been used, it would still have been good yet.

Q. Mr. Campbell, taking into consideration the progress that you had made in installing this conveyor, was
293 it in a usable condition when you left, could it have been used by Benedict?

A. No, it couldn't have been used for anything.

Q. You had not progressed to that point?

A. No. The bin was not completed. The very expensive work was done, all the anchors was in. The retaining wall behind the bin was built, the intermediate tower was built and complete, the tail tower was built and completed, the back anchor where the take-up rope hooked on was completed and ready to hook on, and the load line was strung from mountain to mountain and was on trees

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ready to just start hooking up, and then I would have had my carpenters build the bin while I hooked the rope up, and a considerable bit of this bin timber was already cut and framed and sealed up.

Mr. Milligan: Cross-examine.

Cross-Examination, by Mr. Kramer.

Q. Mr. Campbell, when you came and made the contract which is filed here in this record and shown you a minute ago by Mr. Milligan, there was no arrangement of how you were to be paid other than what is set forth in the paper, was there?

A. You mean any other arrangements other than that?

Q. Yes.

A. There was a verbal agreement Mr. Darst would
294 advance me the money for the payroll each week
and on the completion of the job he would pay me
25 percent plus costs.

Q. Is there anything in this contract about 25 percent plus costs?

A. No, sir. This was a verbal agreement, which verbal agreement is good for a year and a day.

Q. Well, we appreciate the legal information that you are giving us, whether it be accurate or inaccurate. I wouldn't advise anybody to act on——

A. You might leave it out.

Q. But I want to read to you what this agreement says: "It is agreed and understood"——

A. I can pretty near, I think, almost memorize it.

Q. I have another copy and I will let you follow.

A. Go ahead and read it. I will listen. I would have to have these glasses and they are not too good. I know what is in it if you read it.

Q. I am reading the paragraph No. 4.

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"It is agreed and understood that party of the second part will begin work at the earliest possible date, and to push this project to completion consistent with weather conditions and the working of an efficient labor force under the amount of money advanced from week to week by the party of the first part. It is estimated that this project will require approximately 20 to 22 weeks, with no
295 penalties for delays due to inclement weather."

A. That is right.

Q. And the next part: "5. It is understood and agreed by and between the parties that party of the first part is to furnish money to the party of the second part at the end of each weeks work for the purpose of meeting payrolls, the amount furnished to be applied against the total amount as outlined in paragraph 1 above, plus \$125.00 per week of 5 days or \$25.00 per working day for days worked as an allowance to cover use and maintenance of tools and services as boss of the party of the second part. Party of the second part is to keep his own records and payrolls, and is to also apply the \$25.00 per day allowances against the amount set forth above for the completed project."

Now the \$25.00 per day allowance was what?

A. In this contract, when we dictated this contract, I explained to Mr. Darst that being that far from home I had to board and all expenses and everything, that I collect it in this way:

If I worked four days, the job progressed four days this week he was to give me \$100.00 for my expenses and that was to apply on the amount of the contract. That was a cash advance.

Q. To you for your work?

A. Well, I would say to pay me for my work. I
296 asked for cash advance so I could live while I worked.

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Q. In other words, the understanding as we read it from the contract is this: You were to get from Mr. Darst the amount of your payroll you paid out; you were to get in addition to that, \$25.00 a day for your own time; you were to get \$125.00 a week for the use of your tools and machinery, and you were to complete this whole contract for \$12,500.00; isn't that correct?

A. When we signed this contract—

Q. Isn't that correct, and then you may explain. Isn't that correct?

Mr. Winston: If your Honor please, the contract speaks for itself.

The Court: Well, I will let this witness answer in his own language.

By Mr. Kramer:

Q. Isn't that correct, Mr. Campbell?

A. The contract called for \$12,500.00 with these cash advances each week as the job progressed.

Q. My question isn't that. Answer my question and then you may explain all you want to, but my question is that Mr. Darst was to pay enough money to you per week to meet the payroll; he was to pay you \$25.00 per day for the number of days you worked—four days, \$100.00; five

297 days, \$125.00—plus \$125.00 per week to you to cover the use of your tools and equipment; isn't that the contract?

A. There is a mistake in there somewhere.

Q. What is it? Just explain it.

A. I didn't ask Mr. Darst, nothing in there even when he dictated the contract, \$125.00 for the use of my tools.

Q. You don't know how it happens to be in this written contract, what I read awhile ago?

A. No, sir. I didn't ask that of Mr. Darst.

Q. You didn't know it was in there when you signed it?

A. Well, I might have read it being in that but I wasn't harsh about the contract.

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Q. You did receive the \$125.00 a week, did you or didn't you?

A. For the use of materials, use of tools?

Q. Yes.

A. No, sir.

Q. Well, did you receive \$125.00 for any purpose, or was it for your services and tools put together; have I misunderstood it?

Mr. Milligan: You just misread that. Read it again.

A. If I worked five days I would have an allowance of \$125.00 for myself for upkeep of my tools and so forth, and to pay me a little something to live on as I went on the job.

Q. "Plus \$125.00 per week of five days or \$25.00 per
298 working days for days worked as an allowance to cover use and maintenance of tools and services as boss of the party of the second part."

In other words, that was for your services as the boss.

A. Well, that is my fault that is like that. I think I dictated that paragraph myself.

Q. All right. What you had was a contract for which you were to work there for Mr. Darst at \$25.00 a day.

A. No, sir. I wasn't working by the day; no, sir.

Q. And that is what you drew for every day that you were there on the job, was \$25.00 a day?

A. No, I did not. In other words, I did not have enough money in the week allowance to pay the men, and I used the \$25.00 sometimes again to pay men myself, to bring them paid up to date.

Q. Did you pay your men cash or pay these men by check?

A. No, sir, I paid them by cash.

Q. Did you deduct from the men that were working there on this job putting in this piece of equipment, did you deduct any withholding tax and pay it over to the Government?

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A. Sir, I don't have any records on this, not now.

Q. I am not asking you for records. I am asking you how much, and did you deduct any money and pay to the Government for withholding taxes on any of these men?

299 A. I would have to say that I don't have any records. When I left that job, everybody had worried me, if I had crossed the river—there wasn't none to cross—going out, I would have thrown the things in the river.

Q. That is not my question.

A. Some of the men, other than Social Security, would not have had any deductions, and lots—most of the time when I paid the men cash and put it on a contract basis.

Q. In other words, you did not take any withholding off of them, did you?

A. I paid them on a receipt, and wrote the receipt as a contract basis.

Q. And you did not take out any Social Security, the two percent or one and a half percent—I guess it was one and a half percent at that time—you did not deduct any Social Security, did you?

Mr. Winston: We object to all of this about Social Security unless he is representing the Social Security group. I don't think it has any place in this lawsuit.

The Court: Well, it is cross-examination. I cannot see it has anything to do with the lawsuit, but I will let him ask the witness.

By Mr. Kramer:

Q. You did not pay Social Security or file any Social Security returns on these men?

300 A. When I paid them on a contract basis, they accepted it as a contract, I didn't have to.

Q. Well, there is some more legal advice. That was a conclusion. The reason you did not deduct any withholdings and the reason you did not deduct any Social Se-

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curity, was because you and Benedict Coal Corporation understood they were not your employees but they were employees of the Benedict Coal Company?

A. No, sir, they weren't no employees of the Benedict Coal Company, and Benedict at no time had no jurisdiction over who I hired or what they were to get. Neither did Mr. Darst. I was paying these men who I hired, all of them.

The only time I ever had any trouble over who I was going to hire was when the committee, Mr. Scott, Mullins, all of them jumped at me to make me hire. That was all the jurisdiction I had to hire and not to hire, not from the Benedict Coal Company.

Q. Did you at any time have as many as eight men in your employment?

A. Not in my remembrance.

Q. Don't you know part of the time you had as many as 10 and 12 men?

A. There was a time—

Q. Just a minute.

301 A. —you have got to work them over 20 consecutive weeks in one year before you become involved in unemployment compensation.

Q. You knew I was driving toward unemployment compensation, didn't you? Well, you did not pay any unemployment compensation?

A. We didn't work over the limit, not over 20 consecutive weeks in one year.

Q. When you were told there one day by Mr. Lynn, Mr. Mullins, Mr. Scott and the other member of the local mine committee, that these men that were working there were working for the Darst Coal Company, you made the answer to them, "Well, boys"— or, "Well, men, maybe you are right, but let's don't talk about it and we will go on up and join the local."

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That is what happened, didn't it? Just answer yes or no and explain all you want to.

A. Some of them did not have to join. James Thomas, Charlie Pruitt, had cards.

Q. I am asking you if one day there at the job Mr. Lyman, Mr. Scott, Mr. Mullins and other members of the local mine committee, talked to you and they said something to you about joining the local—I don't know just what—and they said to you that these men are really working, all of you are, really working for the Benedict Coal Corporation and we better go up and join the union, and then you said, "Boys, maybe you are right and we will go up and join."

A. No, I never did that because them men at no time was not working for the Benedict Coal Company, and nobody in my employ never did, or never tried to give any orders or tell them what to do other than myself. They were not working for the Benedict Coal Company.

Q. I understand you were over them. Now this man Pruitt was a member of the United Mine Workers, wasn't he?

A. In Harlan somewhere.

Q. And you brought him there with you, didn't you?

A. No, I did not bring him. He never worked for me in Harlan County. Mr. James Thomas had worked for me in Kentucky about two years and they seemed to be friends and Mr. Thomas brought Mr. Pruitt over and persuaded me into hiring him.

Q. And Mr. Thomas was also a member of the United Mine Workers?

A. He worked for me for two years at Lenarue, Kentucky, and put in a job and the mine workers never asked us to join the union:

Q. But you knew when he was over here on this job that he was a member of the United Mine Workers?

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A. No, sir, I never knew it until they come in with their shotguns.

303 Q. He showed you a card they were carrying from over yonder, whatever it was, didn't he?

A. No.

Q. Did you ever see a card form?

A. Not Jim Thomas. I didn't know he was even a member.

Q. Who was the third man you brought with you from over there?

A. Fred Thomas. I only brought two. James and Fred brought Pruitt.

Q. Three got over there. You say you brought two?

A. Dozer operators.

Q. Were both of the Thomases members of the United Mine Workers?

A. I don't know whether Fred was or not.

Q. But you do know the other one was?

A. No, I didn't know he was but I found out he was when he brought the shotgun up there.

Q. You told this committee that morning down there, Mr. Mullins and Mr. Scott and Mr. Lynn, that you were going to join and have your men join the union, didn't you?

A. We went down and stood in the room a half-day to join and they wouldn't take them.

Q. You did join, didn't you?

A. No.

304 Q. You never joined the union?

A. No, sir. No, I never joined.

Q. I thought you told Mr. Milligan—did I misunderstand—that you had joined the union?

A. No. I signed a UMW contract but I never joined the union. They wouldn't allow me.

Q. You signed the contract as an employer?

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A. Yes.

Q. But you did not join as an individual?

A. Pretty important I sign, too, because that fellow that drove to Norton had a gun.

Q. Who was the man that had a gun?

A. Mr. Lynn.

Q. He was the president of the local?

A. Yes, sir.

Q. Where were you when he had a gun?

A. He was riding in the middle.

Q. He was where?

A. Riding in the middle in the front seat.

Q. Well, did he have the gun while you were signing the contract?

A. No, but I could feel the gun right next against my side.

Q. I thought you said you went on up ahead of the men?

305 A. I couldn't have went ahead of them because we were all riding in the same car, in the front seat.

Q. But after you got to where you were,

A. I went ahead of them up the stairway.

Q. They weren't with you when you signed the contract?

A. When they ushered me into the office they had me at headquarters. That is just like taking a man to jail, pushed the door shut and you got him.

Q. And Mr. Condra was there?

A. Yes, sir.

Q. And you say Mr. Condra had a gun, too?

A. No, sir, I didn't see it.

Q. And Mr. Scroggs had a gun?

A. No. I said Ellis Lynn had one riding in the car. I didn't see the gun in the office but I do know Ellis Lynn had a gun in the car. It was my car.

Q. And you saw it?

Testimony of M. M. Campbell

A. I didn't have to see it. I could feel the print of it against me. If you had as many guns punched in your ribs you would know one when you got up against it.

Q. When you signed this United Mine Workers Agreement, you say you signed it before it was ever filled out?

A. Yes, sir, I did.

Q. Didn't you ask them for a copy then?

A. No. I took it gentleman like. I asked him would
306 they mail me a copy and they did.

Q. And they did it?

A. Yes.

Q. You got a copy?

A. That's right.

Q. And you did not send it back?

A. No.

Q. You kept a copy?

A. I signed it and kept it.

Q. And kept it. Did you abide by it?

A. We did not finish the job.

Q. Did you abide by it during the time you were operating thereafter?

A. I didn't check any dues out, no.

Q. No. 1 thing.

A. I figured the men would pay their own dues.

Q. Did you take welfare fund out of it?

A. I was not a coal operator, and after I looked it over I seen I wasn't under any tonnage and I wouldn't know how to weigh the timber to pay tonnage on it, and we didn't dig dirt out to pay any tonnage.

Q. Did you write any letter?

A. No. I felt if I got out of that one they wouldn't get me in any more offices.

Q. Did not write a letter?

307 A. I read a lot about Stalin and I didn't want to get mixed up with any Communists.

Testimony of M. M. Campbell

Q. Did you pay union scale for work outside, around the mine?

A. We did not work very much after that.

Q. In fact, you never permitted your men to know what they were making a day; you tried to put it on what you call a contract basis, didn't you?

A. I could permit you to know this. My men, they were all my employees so automatically I was over their job. The trouble was on this local, and these men needed to work. I told them I was going to sign a contract and my men met in a huddle at the tool house one evening and said, "Mr. Campbell, you go on up and sign a contract. We have always been satisfied and we will go ahead and work for you. We will work. We need this job." One man said, "I am only feeding my kids on what I make."

Q. Who was that?

A. A man who worked for me.

Q. Who was he?

A. Fred Thomas.

Q. He is one of the fellows that you say came with you and was a member of the organization, or the one you did not know about?

A. I never seen two better men than James Thomas
308 and Fred. They worked with me up in Lenarue, Kentucky.

Q. Fred Thomas was the man you said made the statement?

A. Fred Thomas made the statement to me he needed the money each week and he had no way of getting a job in Harlan.

Q. What was your contract with Fred Thomas, you were going to pay him so much under a contract?

A. There wasn't any contract with Fred Thomas, to pay him under a contract.

Q. How did you pay Fred Thomas?

Testimony of M. M. Campbell

A. I paid him cash and he signed a receipt.

Q. But you said you had all of these men employed under a contract arrangement.

A. I told you that whenever I paid these men by cash that I wrote a receipt as a contract basis, whatever they had coming, it was shown on the receipt "contract." That automatically involved that man, if he wanted to pay Social Security working on a contract basis, it was up to him to pay his own and pay his own withholding.

Q. When did you agree with him how much you were going to pay them a week or per month on a contract?

A. Well, we always come to that, whatever he had coming, it was just put on the receipt.

Q. But how did you know what he had coming before you arrived at it?

A. It was very easy. I could keep time for 10 men
309 without a time book.

Q. Were you paying them on an hourly basis? So much an hour, so much a day, so much a week or so much a month?

A. They were working by the day.

Q. What did you pay them a day?

A. Whatever the rate was.

Q. What was the rate?

A. Well, after we signed the contract it was more. I don't remember what the agreement was on the contract, how much the wage was. All I do know I wasn't running coal enough to pay the welfare fund, and I think a hundred dollars for vacation pay because I didn't have nothing to pay tonnage off of; I wasn't a coal operator.

Q. This man Thomas, I thought he was one of the fellows that held a gun on you?

A. Sir?

Q. This fellow Thomas that you said was a good fellow—

Testimony of M. M. Campbell

A. Seemed like he would be.

Q. —wasn't he one of the fellows that held a gun on you?

A. They did not hold no gun. They had three shotguns in the car with them.

Q. He was one of the fellows in the car with the shotgun?

A. They had their car there and shotguns up in
310 front of the tool house in the car.

Q. That was not the time you took your friends up in your car; you are talking about another time?

A. This is another time when the other men from the Benedict local were down there. I would say between 15 and 25 of them, and they all met at the car, did not work that day, they all left.

Q. Was that after you had signed the contract?

A. Yes.

Q. And this Mr. Thomas that you said was a good man, was one of the men that got in the car and had a shotgun?

A. It was in his car. He did not get in my car.

Q. Get in the car with you?

A. No, did not get in my car.

Q. You got in a car in which there was a shotgun?

A. He was already in the car when they pulled up. It was his car.

Q. You and Mr. Darst finally agreed just to quit the contract, didn't you?

A. Mr. Darst and myself.

Q. Just answer and then you can explain. You and Mr. Darst just mutually agreed to quit or did you quit or did he fire you?

A. We mutually agreed to let the work alone and finish at a later date.

311 Q. Did you figure up how much you had spent on it at that time?

Testimony of M. M. Campbell

A. I had nothing coming because I couldn't finish the job.

Q. Did you figure how many days you had and how much you collected on the \$125.00 a week basis?

A. Didn't have to. That was figured as it went along. You read that in the letter contract and each week he advanced it.

Q. Did he pay you anything in addition to this?

A. Didn't have nothing coming.

Q. Did he pay you anything?

A. I got some money. I had to hock some of my equipment to get out of there.

Q. How much money did you get from him.

A. \$150.00. I had to borrow it to get out. He did not owe me nothing on the contract.

Q. Have you gotten any more money from him since then?

A. No, sir.

Q. None at all?

A. No, sir.

Q. You quit there in the middle of August?

A. About it. It was along the last of August when we left there.

Q. Did you have any trouble in which there was a suit brought against you and you were garnisheed there?

A. Well, that wouldn't be necessary to explain it in this court.

Mr. Winston: We object to it as being immaterial.

The Court: Sustained.

Q. I am going to ask you this question. Don't answer until his Honor rules, if another reason that contract was terminated was not that you got into difficulty, that you were sued and a judgment was rendered and your wages were garnisheed and you got into trouble between you

Testimony of M. M. Campbell

and Mr. Darst and that is the real reason that contract was terminated at that time?

A. No. There was a garnishee against me, a man worked for me down in West Virginia——

Mr. Winston: You don't have to answer.

The Court: Yes, he may answer that.

A. (Continuing) and I paid him down there and had a receipt signed by his own hand. He had tried to break down the receipt, and Mr. George Grable was the Judge there, not like a justice court, they don't have justices in West Virginia, and I laid my receipt on the desk, and he signed his name Cecil Stout only that time he signed it Cecil A. Stout. As plain a handwriting as mine is on that contract.

Q. You don't have to go into all the details.

A. You asked for it.

313 By the Court:

Q. Mr. Campbell, as I understand your answer to that question is no, you did not quit because of any garnishment? That ends that. Let's not go into it.

A. I didn't quit on account of a garnishee. I was trying to explain.

The Court: That is sufficient when you say you did not.
By Mr. Kramer:

Q. Did that garnishment occur about the time or at the time the contract was ended?

A. No. This garnishment affair occurred back in the winter.

Q. Was there another garnishment affair?

A. There might have been, but it doesn't have any effect on anything about quitting.

Q. I want to ask you if there wasn't another garnishment affair which did occur at about the time you and Mr. Darst ended the contract?

A. Well, I wouldn't have quit on account of that.

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Q. Answer that question.

A. I don't know. There wasn't any paper served on me, and otherwise I wouldn't know.

Q. You don't know anything about another one at that time?

314 A. No, there wasn't any paper served on me if there was.

Q. You just say if there was another garnishment affair at that time you didn't know about it?

A. I don't know it, no.

Mr. Kramer: That is all, your Honor.

Mr. Winston: Come down.

(Witness excused.)

Mr. Winston: If your Honor pleases, we have some responses to requests for admissions that will probably take 30 or 40 minutes to read. We have a stipulation that will take about 15 minutes to read, and I am wondering if your Honor wants to adjourn, the reason I make that inquiry.

(A discussion was had concerning time of adjournment.)

Mr. Winston: Your Honor, I believe if I would request Mr. Darst, if I would read the request and have him read back the answer—

Mr. Kramer: I do not object to one of the attorneys doing that—go ahead, it will expedite it.

The Court: Let Mr. Hardin do it.

Mr. Kramer: I will withdraw my objection. Let the witness do it.

The Court: I think, Mr. Hardin, you just read the question. This, I take it, is a legal question and a lawyer will be in a better position to read than a
315 layman. Have a seat over here.

Mr. Winston: Your Honor and lady and gentlemen of the jury, this is a request for admission filed by the Benedict Coal Corporation requesting the cross-defendants to answer certain questions.

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"The Benedict Coal Corporation, defendant and cross-complainant in the above action, requests United Mine Workers of America and United Mine Workers of America, District 28, the defendants to the cross-claim filed herein, within fifteen days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

"A. That each of the following statements is true."

Request No. 1. "That Allen Condra was President of District 28, United Mine Workers of America, from June, 1951, until 1954."

Mr. Hardin: "Allen Condra was Acting President of District 28, United Mine Workers of America, from October 16, 1950, to April 1, 1951. He was President of District 28 from June 25, 1951, to May 31, 1954."

Mr. Winston: Request No. 2. "During the period in question in this case John L. Lewis has been the
316 president of the United Mine Workers of America?"

Mr. Hardin: "Requests for Admission No. 2 is admitted."

Mr. Winston: Request No. 3. "There are two types of districts, autonomous districts and provisional districts."

Mr. Hardin: "There are three types of districts, namely, autonomous, provisional and constitutional."

Mr. Winston: Request No. 4. "District 28 of the United Mine Workers of America is and has always been a Provisional District."

Mr. Hardin: "Request for Admission No. 4 is admitted."

Mr. Winston: Request No. 5. "Provisional District 28 has never had a representative on the International Executive Board."

Mr. Hardin: "Request for Admission No. 5 is admitted."

Mr. Winston: Not to be misleading, I do understand that since the date of these things that probably that they

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do have a representative now, sir. I don't want to be misleading to the Court, but as of this date I think that is correct.

Request No. 6. "The power of the President to revoke charters and to create provisional governments has been exercised on several occasions."

Mr. Hardin: "Request for Admission No. 6 is admitted." 317

Mr. Winston: Request No. 7. "An autonomous District Union is a District Union which elects its own chief executive officers and which, within the scope of the Constitution of the UMWA, manages and conducts its own affairs."

Mr. Hardin: "Request for Admission No. 7 is admitted."

Mr. Winston: Request No. 8. "On the other hand, a provisional District Union is a District Union which has its chief executive officers appointed by the President of the International Union with the approval of the International Executive Board."

Mr. Hardin: "In a provisional district of the United Mine Workers of America some of the chief executive officers are appointed by the President of the International Union, United Mine Workers of America, by and with the consent of the International Executive Board and some of the officers are elected."

Mr. Winston: Request No. 9. "The affairs of a provisional District Union are managed and conducted by the International Union through appointees of the International Union."

Mr. Hardin: "The Request for Admission No. 9 is denied. The affairs of a provisional district are 318 managed and conducted by district officers. It manages and conducts its own affairs the same as an autonomous district."

Mr. Winston: Request No. 10. "At the Thirty-fourth

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Constitutional Convention; held in Washington, D. C., from January 28 to February 7, 1936, International President John L. Lewis addressed the Convention regarding the matter of autonomy and, among other things, said the following: 'As you know, in district after district we are constantly in receipt of complaints against elective officers. The International Union is handicapped in these things because of the autonomous rights of the constitutions of the several districts. But file a complaint against one of the officers of these provisional districts and you have your day in court before the International Executive Board, you have the right of immediate action.' "

Mr. Hardin: "Request for Admission No. 10 is admitted."

Mr. Winston: Request No. 11. "The Joint Report of the International Officers to Officers and Delegates of the Thirty-fifth Constitutional Convention of the UMWA, held in Washington, D. C., from January 25 to February 3, 1938, contained a section headed 'Autonomy.' "

Mr. Hardin: "Request for Admission No. 11 is admitted."

Mr. Winston: Request No. 12. "That section of the Joint Report read as follows:

" 'A number of resolutions have been presented to this Convention on this subject. Two years have passed since the last Convention at which time we said to the Convention:

" 'Requests have been presented to the International Organization for the restoration of autonomy in some districts. Some local Unions have written to the International Office advising against the restoration of autonomy. Many resolutions have been presented to the Convention from Local Unions for and against restoration of autonomy in some districts. There is no doubt as to the honesty of the opinions of both sides of this question. The matter is important. After all the question should be measured in

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the light of its effect upon the membership of the respective districts.

“The question of democracy in this autonomy matter is not pertinent to the issue. The democracy of the United Mine Workers of America is not an issue. We have a democratic institution, with constitutional government, whether functioning through the regularly established districts or through provisional districts. The International Organization is given its grant of authority by an
320 International Constitutional Convention. Certainly the essence of democracy is practiced by every branch of our organization. Some people confuse democracy with license. That democracy is best which protects and advances the best interests in the membership. Many great labor organizations in this country which are ultra-democratic in principle do not have as broad a premise of democracy for the conduct of their affairs as has the United Mine Workers of America.

“The International Organization, under authority of the Constitution, in the creation of provisional districts, acted with the single purpose of protecting and advancing the best interests of the mine workers of those districts, and so that their business might be conducted on an efficient economic basis. There is no question but that this policy of the International Organization has served and continues to serve that purpose. No complaint has been raised about the efficiency or the economy of this arrangement, or about the results obtained under this arrangement.

“In fact, the tenor of many of the resolutions sets forth that as a result of the International policy, stability, efficiency and economy have been restored to the various districts; the rights of the members have been fully protected;
321 but that now autonomy is in order because of this very satisfactory situation.

“However, we believe that we have had enough ex-

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perience to justify a substantial grant of autonomous government to such self-sustaining provisional districts as may be desirous of securing it, and we propose that we treat the whole question in an affirmative and constructive way.

“Upon proper presentation of substantial requests for autonomy in any district or districts, the International Executive Board shall take into consideration such requests and with due consideration for the protection and advancement of the rights of our members in such districts and the stability and efficiency of the organization, shall be authorized at its discretion to instruct any such district that substantial autonomy is granted and that such district shall then proceed as follows:

“Under the precise supervision of the International Executive Board the district shall meet in District Convention and adopt a constitution providing for the proper conduct of the affairs of the district; provide for the nomination and election of district officers; except President and Secretary-Treasurer and otherwise provide for district self-government. All such district laws shall be consistent with the provisions of the International
322 Constitution and not in conflict therewith and shall be subject to approval of the International Executive Board.

“The only exceptions to the above recommendation are the offices of Presidents and Secretary-Treasurers in such districts who shall continue to be selected by the International Executive Board and designated to hold such offices subject to International and district laws, until such time as the International Executive Board shall provide otherwise.

“We believe that the above suggestions fully meet the needs of the situation, are protective of the rights of the membership and at the same time give to the International

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Organization that small measure of advisory supervision that is conducive to the proper discharge of the obligations resting upon the International Organization.' "

Mr. Hardin: "Request for Admission No. 12 is admitted."

Mr. Winston: Request No. 13. "John L. Lewis has on occasion ordered the dismissal of Field Representatives employed by District 28."

Mr. Hardin: "Request for Admission No. 13 is objected to."

Mr. Winston: I will come back to that.

323 Request No. 14:

Mr. Kramer: Just a minute. There must have been an action by the Court. I don't have my copy.

The Court: I held he should answer, as I recall.

Mr. Kramer: If he had to answer, it is here somewhere. Let's get it in and put it in.

Mr. Winston: This is No. 13, sir. I will re-read that.

Request No. 13. "John L. Lewis has on occasion ordered the dismissal of Field Representatives employed by District 28."

Mr. Hardin: "Now comes the cross-defendants, United Mine Workers of America and United Mine Workers of America, District 28, and in response to the cross-plaintiff's Request for Admission No. 13 filed in the within action on February 4, say that they, and each of them, have examined the records of the respective organizations and such records fail to disclose any occasion on which John L. Lewis ordered the dismissal of any field representative employed by District 28.

"For further answer John Owen, Secretary-Treasurer, International Union, United Mine Workers of America, say that he has discussed this matter personally with John L.

324 Lewis and that the said John L. Lewis has no recollection of any occasion when he ordered the dismissal of any field representative employed by District 28.

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Signed John Owens, sworn to and subscribed to before me the 25th day of May, 1955."

Mr. Winston: Request No. 14. "Charles Minton was dismissed as Field Representative of District 28 in 1951 at the direction of the office of John L. Lewis."

Mr. Hardin: "The office of John L. Lewis suggested to President Condra of United Mine Workers of America, District 28, that the services of Charles Minton, Field Worker for the District, be discontinued."

Mr. Winston: Request No. 15. "Allen Condra was appointed President of District 28 by John L. Lewis in 1951."

Mr. Hardin: "Allen Condra was appointed President of District 28 by John L. Lewis acting as President of the International Union in accordance with the constitution of the International Union, and by and with the consent of the International Executive Board."

Mr. Winston: Request No. 16. "The following letter dated June 25, 1951, was sent by John L. Lewis to each Field Representative and Clerical employee of District 28 when Mr. Condra was appointed President of District 28:

"Memorandum to Each Field Representative and Each Clerical Employee of Provisional District No. 28, 325 United Mine Workers of America:

"Effective this date, you are herewith advised that Mr. Allen Condra is designated President of Provisional District No. 28, vice William Minton, detached and on an indefinite leave of absence. Your official and personal cooperation with this new arrangement is requested and expected.

"President Condra is assuming office in the District at a time when the District is burdened with grave and serious problems, which vitally affect the United Mine Workers of America. He is entitled to receive the unqualified and loyal support of each paid representative of our Union, and anything less than this will receive the attention of this office.

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“The officers of the International Union will hope for improvement in the District affairs.”

Mr. Hardin: “Request for Admission No. 16 is admitted.”

Mr. Winston: Request No. 17. “The National Bituminous Coal Wage Agreement of 1950 and the same agreement as amended in 1952 was signed by John L. Lewis for the United Mine Workers of America.”

Mr. Hardin: “Request for Admission No. 17 is admitted. Vice President, Thomas Kennedy, and Secretary-Treasurer, John Owens, also signed the National Bituminous Coal Wage Agreement of 1950 and the same agreement as amended in 1952 for the United Mine Workers of America.”

Mr. Winston: Request No. 18. “The National Bituminous Coal Wage Agreement of 1950 was signed by W. F. Minton for District 28, United Mine Workers of America.”

Mr. Hardin: “Request for Admission No. 18 is admitted.”

Mr. Winston: Request No. 19. “The National Bituminous Coal Wage Agreement of 1950 as amended September 29th, 1952, was signed by Allen Condra for District 28, United Mine Workers of America.”

Mr. Hardin: “Request for Admission No. 19 is admitted.”

Mr. Winston: Request No. 20. “The 1950 Contract as amended September 29th, 1952, provided for a per diem wage increase for the mine workers of \$1.90 a day.”

Mr. Hardin: “Request for Admission No. 20 is admitted.”

Mr. Winston: Request No. 21. “The Wage Stabilization Board in October, 1952, refused to approve more than \$1.50 of this increase.”

Mr. Hardin: “The Wage Stabilization Board on October 18, 1952, refused to approve more than \$1.50 of this increase.”

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Mr. Winston: Request No. 22. "The operators who signed the 1952 contract were willing to pay the full \$1.90 a day raise if the Wage Stabilization Board would grant approval."

Mr. Hardin: "Request for Admission No. 22 is objected to."

Mr. Kramer: Just a minute. Request No. 22 was objected to and was sustained and is not in the record.

The Court: Don't read it then.

Mr. Winston: That is correct.

Request No. 23. "After the Wage Stabilization Board refused to approve the full \$1.90 per day increase, a number of the members of the United Mine Workers throughout the country refused to work."

Mr. Hardin: "Request for Admission No. 23 is admitted."

Mr. Winston: Request No. 24. "During the period of this walkout Mr. John L. Lewis sent the following letter dated October 21, 1952, to Mr. Harry Moses:

Washington, D. C.,
October 21, 1952

"Mr. Harry M. Moses, President

"National Bituminous Coal Operators' Association

"918 Sixteenth Street, N. W.

328 "Washington, D. C.

"Dear Mr. Moses:

"Your letter. You have a contract. It is with your Association. It is complete. It speaks for itself. You signed it. It was negotiated in the American way—through collective bargaining. It is as pure as a sheep's heart.

"Now comes the attempt to dismember it. Four agents of the National Association of Manufacturers, aided by a

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professor from the Harvard Law School and his timid trio of dilettante associates, form a cabal to steal forty cents a day from each mine worker.

"Naturally miners resent such attempted thievery. Miners are people, Mr. Moses. They have children. Children need milk. The forty cents would buy milk each day. You of all men should know that the mine workers will fight to protect the milk supply of their families.

"The NAM—Professor Cox cabal ignored the representatives of labor. The procedure invalidates collective bargaining, substitutes compulsory arbitration, and would make economic serfs of American citizens. The representatives of Labor upon the Board may yet be heard from on this subject.

329 "You assert that many miners are not working. You also know that they are outraged by the attempt of the NAM ruffians to filch milk money from their purse. They are acting as individuals. They are exercising their rights as individuals and free-born Americans. They have not sought nor been given advice nor suggestions by their Union or this writer. We have a contract. We expect your compliance with its provisions. Miners will work when you honor its provisions. If you do not like the contemptible action of the NAM labor baiters and the little Harvard professor and his quavering trio, appeal and ask for review and reversal. You are the sole petitioner and plaintiff.

"Mr. Putnam gravely assures you that you have time to appeal because there are ample stocks of coal and there can be no emergency. Mr. Putnam is an honorable man and comes from a good New England family. His only sadistic trait is his penchant for robbing miners' babies of life-giving milk. It is true that Mr. Putnam occasionally blows a mental fuse. For instance, compare his re-

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cent approval of a \$5.50 per ton increase for the steel companies—which he held was not inflationary—with his present decision that forty cents worth of milk for miners’

babies is highly inflationary and endangers the Republic.
330

Very truly yours,

/s/ JOHN L. LEWIS

Mr. Hardin: “Request for Admission No. 24 is admitted.”

Mr. Winston: Request No. 25. “The letter referred to in paragraph 24 was made public.”

Mr. Hardin: “Request for Admission No. 25 is admitted.”

Mr. Winston: Request No. 26. “After President Truman assured Mr. Lewis that there would be a review of the entire matter, John L. Lewis requested the United Mine Workers to return to work.”

Mr. Hardin: “Request for Admission No. 26 is admitted. On October 26, 1952, the President of the United States invited to a conference Messrs. Harry M. Moses, President of the Bituminous Coal Operators’ Association; John L. Lewis, President of the United Mine Workers of America; John R. Steelman, Assistant to the President; Roger L. Putnam, Economic Stabilization Administrator; David L. Cole and David B. Charnay. At this conference, the President assured the parties that serious and prompt consideration would be given to the request for the review of the ruling of the Wage Stabilization Board, in

light of the circumstances set forth in a joint
331 letter of Messrs. Lewis & Moses to Mr. Putnam.

Mr. Moses stated that the Operators affiliated with his organization were prepared to start paying immediately the \$1.50 allowed by the Wage Stabilization Board and set aside available for payment to the miners, when and if approved, the balance of the increase amounting to

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40¢ per day, retroactive to October 1, 1952. On urging of the President of the United States, Mr. Lewis agreed to use his best efforts to effect at once a resumption of work in the mines."

Mr. Winston: Request No. 27. "The request referred to in paragraph 26 was made by telegrams sent October 26, 1952, to all districts."

Mr. Hardin: "Request for Admission No. 27 is admitted."

Mr. Winston: Request No. 28. "This request, referred to in paragraph 27, was the first attempt on the part of Mr. John L. Lewis to get the miners back to work during that strike or walkout."

Mr. Hardin: "Request for Admission No. 28 is denied. Upon execution of the September 29, 1952, contract and continuously thereafter, the defendant Union, its officers and representatives, sought Government approval of such contract and endeavored to obtain compliance therewith by all operators signatory thereto. Such stoppages
332 as occurred in any of the coal mines covered by said contract were not called or authorized by the defendant Union or any of its officers or representatives, and where they occurred they were the voluntary actions of the individual employees and were not directed or authorized by the defendant Union or its officers or representatives."

Mr. Winston: Request No. 29. "No attempt was made by Mr. John L. Lewis to settle this walkout in October, 1952, by the methods provided for by the existing contracts between the United Mine Workers of America and the signatory operators."

Mr. Hardin: "For answer to Request for Admission No. 29 reference is made to answer to Request for Admission No. 28 hereinabove. The 1952 contract provided as follows: 'The United Mine Workers of America and the Op-

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erators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims ~~which are not settled~~ by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts.' Such stoppages as occurred in October, 1952, were voluntary and unauthorized stoppages of individuals and every effort was exerted by the defendant Union, its officers and representatives, to solve and settle these sporadic and widespread stoppages in accordance with the contract provisions herein quoted."

The Court: Lady and gentlemen of the jury, keep in mind the instructions that I gave you at the beginning of this trial.

Adjourn Court until 9 o'clock tomorrow morning.

Mr. Kramer: I wonder if your Honor would hear counsel out of the presence of the jury a minute.

The Court: The jury is excused but at the request of Mr. Kramer I have reconvened Court. I want to hear counsel about some matter.

(Whereupon, the jury was excused until 9 o'clock the following morning, and a discussion was had off the record concerning time of adjournment.)

(Whereupon, at 5:35 p. m. Court adjourned until 9:00 a. m., Wednesday, March 21, 1956.)

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958/19

No. ~~18~~ 18

JOHN L. LEWIS, ET AL., PETITIONERS,

.vs.

BENEDICT COAL CORPORATION.

No. ~~19~~ 19

UNITED MINE WORKERS OF AMERICA, ET AL.,
PETITIONERS,

.vs.

BENEDICT COAL CORPORATION.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONS FOR CERTIORARI FILED DECEMBER 5, 1958
CERTIORARI GRANTED FEBRUARY 24, 1959

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Wednesday, March 21, 1956.

(Whereupon, at 9:05 a. m. Court reconvened pursuant to adjournment, and the following proceedings were had in the presence of the jury, to-wit:)

The Court: Gentlemen, you may call your next witness.

Mr. Winston: We filed a stipulation as to the Constitutions of the United Mine Workers. I wish to present to the Court and the jury the exhibits of the Constitutions and present them in evidence.

If your Honor please, and lady and gentlemen of the jury, this is a stipulation that has been filed.

"In this action, and cross-action, we stipulate that the copy of the Constitution of the United Mine Workers of America hereto attached and designated as Exhibit 1 is a copy of the Constitution of the International Union, United Mine Workers of America, which was in effect from November 1, 1948, through October 31, 1952."

"We further stipulate that the copy of the Constitution of the United Mine Workers of America hereto attached and designated as Exhibit 2 is a copy of the Constitution of the International Union, United Mine Workers of America, which has been in effect from November 1, 335 1952, and which is in effect on the date of execution of this stipulation."

"We agree that this stipulation may be filed and read as evidence in this action."

This is signed by counsel for both parties.

This morning I would like to read you short portions of, first, the Constitution of 1948 which, as stated, was in effect until 1952.

The first portion is on page 5 headed Article III, Jurisdiction, Section 1.

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"Section 1. The International Union shall be composed of workers eligible for membership in the United Mine Workers of America, and may be divided into Districts, Sub-Districts and Local Unions. The International Union shall have supreme legislative, executive and judicial authority over all members and subordinate branches, and shall be the ultimate tribunal to which all matters of importance to the welfare of the membership and subordinate branches shall be referred for adjustment. Between International Conventions the supreme executive and judicial powers of the International Union shall be vested in its Executive officers and Executive Board in accordance with and subject to the provisions of this Constitution."

336 "Section 2. All Districts, Sub-Districts and Local Unions must be chartered by, and shall be under the jurisdiction of and subject to the laws of the International Union and rulings of the International Executive Board. Charters of Districts, Sub-Districts, and Local Unions may be revoked by the International President, who shall have authority to create a provisional government for the subordinate branch whose charter has been revoked. This action of the International President shall be subject to review by the International Executive Board upon appeal by any officers deposed or any members affected thereby. Until such review is had and unless said order of revocation is set aside, all members, officers and branches within the territory affected by the order of revocation shall respect and conform to said order. An appeal may be had from the decision of the Executive Board upon such order of revocation, to the next International Convention."

Now Article IV, Districts, Section 1—I want the jury and Court to understand I am not attempting to read the whole thing but just portions and, of course, with leave to the other party to read which portions of it to the jury it wishes, or the whole thing if they may wish.

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Mr. Kramer: However, it is all introduced.

Mr. Winston: That is correct.

The Court: Yes, sir.

337 Mr. Winston: "Districts may be formed with such numbers and territory as may be designated by the International Officers and may adopt such laws for their government as do not conflict with the laws or rulings of the International Union or Joint Agreements.

"Section 2. The International Executive Board shall have authority to change the boundaries of Districts as conditions may require; but the boundaries of self-supporting Districts shall not be changed except by a vote of the membership affected, as determined by the District, the referendum to be taken by the officers of the District affected and representatives of the International Union. All Local Unions must pay all taxes and assessments due the District to which they were attached before the change of boundary was made."

Page 10, Article V, Sub-Districts. "Sub-Districts may be formed and assigned such numbers and territory as may be designated by the District of which they are a part, subject to the approval of the International Executive Board; and such Sub-Districts may, after being duly chartered, adopt such laws for their government as do not conflict with the laws and rulings of the International or District Unions or joint agreements."

Article VI, Local Unions, Section 1. "Section 1. Local
338 Unions may adopt such laws for their government as do not conflict with the laws or rulings of the International, District or Sub-District Unions or Joint Agreements.

"Section 2. Each Local Union shall have the right to penalize its own members, or (except as prohibited by Section 17 of Article XV) debar from membership any applicant for membership therein, but any member so penalized or any person so debarred shall have the right of

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appeal in consecutive order to the Sub-District, District and International Unions, any one of which branches shall have authority to reverse the decision of the Local Union; and any Local Union debarring any applicant from membership shall give such applicant written reason for his debarment.

“Section 3. If in the judgment of the officers of the International, District or Sub-District Unions, any Local Union has taken any action opposed to the interests of the United Mine Workers, the International Union or the District or Sub-District Unions having jurisdiction over the Local Union shall have the right to reserve the action of the Local Union.

“Section 4. Should any Local Union be dissatisfied with the decision of any of the governing branches (unless prohibited by joint agreement) it shall have the right
339 to appeal to the branch next in authority until a final decision is reached, as provided in Section 3 of Article III.

“Section 5. Where it is decided that any branch of the Organization has done an injustice to any member, or applicant for membership, the branch responsible for the injustice must compensate such member or applicant for time lost and expense incurred while defending his rights, and any such defendant shall be restored to all former rights and privileges in the Organization.”

Article VII, Officers. “The officers of the International Union shall be one President, one Vice President, one Secretary-Treasurer, three Tellers, three Auditors, and one Executive Board Member from each of the Districts over which the United Mine Workers has jurisdiction, the last named of which shall constitute the International Executive Board.”

Article IX on page 14, Duty of Officers, Section 1. “The President may preside over all International Conventions and Meetings of the International Executive Board and

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sign all bills and official documents when satisfied of their correctness.

“Section 2. He shall fill by appointment all vacancies occurring in any International Office, except International Board Members, who shall be elected by the District in which the vacancy occurs.

340 “Section 3. He may suspend or remove any International Officer or appointed employee for insubordination or just and sufficient cause.

“Section 4. He may appoint a member whose duty shall be to collect and compile statistics on the production distribution and consumption of coal and coke, freight rates, market conditions, and any other matter that may be of benefit to the Organization. Said statistician shall make a report to the regular convention.

“Section 5. He may appoint such organizers, field and office workers as may in his judgment be necessary to conduct the affairs of the International Union.

“Section 6. He may visit in person or appoint an International Officer to visit any branch of the U. M. W. of A., or any other place, if in his judgment such visit will be of benefit to the U. M. W. of A.

“Section 7. He shall interpret the meaning of the International Constitution but his interpretation shall be subject to repeal by the International Executive Board. Between sessions of the International Executive Board he shall have full power to direct the workings of the Organization and shall report his acts to the International Executive Board for its approval.”

Coming to Article XIV, Local Unions, How Formed
341 and Governed, Section 1. “Local Unions shall be composed of ten or more workers, skilled and unskilled, working in or around coal mines, coal washeries, coal processing plants, coke ovens, or in other industries designated and approved by the International Executive

Board, but seven members shall be a quorum for a Local Union."

Now going to Section 4 on page 50. "The charter fee for Local Unions organized by salaried officers or organizers of the International, District or Sub-District Unions shall be \$20.00, which shall entitle the Local organizer to one charter, one press seal, one ledger, one record book, one book of orders on treasury, one Treasurer's receipt book, fifty International Constitutions, fifty due cards, one manual, one gavel, one copy of the proceedings of the last International Convention and such other documents as the International Secretary-Treasurer may desire to send them.

"Section 5. The charter fee for Local Unions organized by Local organizers shall be \$27.00, \$7.00 of which may be retained by the Local Organizer and the remaining \$20.00 of which must be sent to the International Secretary-Treasurer. .

"Section 6. When a Local Union is organized the Organizer must send a report and the charter fee to
342 the International Secretary-Treasurer within one week or show valid cause for the delay.

"Section 7. Unless a dispensation has been granted in accordance with Section 11 of Article IX, the initiation fee shall be \$50.00, but no applicant shall be eligible for initiation until he has started to work at a mine under the jurisdiction of the Local Union where application for membership is made.

"Applicants for membership must pay the full amount of the initiation fee into the Local where application is first made; the full amount to be paid within five months or the first payment shall be forfeited.

"The initiation fee shall be divided as follows: \$20.00 to be retained or forwarded to the Local Union; and \$30.00 forwarded to the International Secretary-Treasurer."

Section 11 on page 52. "The Local dues to be paid by each member shall not be less than four dollars per month (\$48.00 per year), to be divided as follows: One dollar to be retained or sent to the Local Union; one dollar to be retained by the District organization; and two dollars to be forwarded to the International Secretary-Treasurer, together with such assessments as may be levied by the different branches of the Organization."

343 Now coming to Section 19 on page 56 of the Constitution. "When a mine is abandoned indefinitely and all the members of the Local Union having jurisdiction over it have gone to work elsewhere, the Local Recording Secretary must notify the District Secretary of the fact, and the District Secretary must collect the charter, seal, moneys, books, supplies, property, including real estate, belonging thereto and notify the International Secretary-Treasurer."

To Section 21 on page 57. "If any mine or colliery is permanently abandoned, or should any Local Union for any cause disband, or should its charter be revoked, the charter and all moneys, supplies and property, including real estate belonging thereto, shall be taken over by the International Union; provided, that any remaining members of such Local Union in good standing shall be given transfer cards."

We file those portions that we want to read at this time, but we file both that and the Constitution of November 1, 1952, as evidence in this case.

The Court: Do you want to make this stipulation an exhibit and number it numerically like the others?

Mr. Winston: Yes, sir.

(Exhibit No. 17 was filed.)

344

FRED RUDISAIL,

called as a witness by and on behalf of the defendant-cross plaintiff, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Winston.

Q. Your name is Fred Rudisail?

A. Yes, sir.

By the Court:

Q. How do you spell that last name?

A. R-u-d-i-s-a-i-l.

By Mr. Winston:

Q. Where do you live, Mr. Rudisail?

A. I live in Knoxville, Tennessee, 4305 Plummer Road.

Q. By whom are you employed?

A. By the Holmes-Darst Coal Corporation.

Q. What type business is the Holmes-Darst Coal Corporation?

A. We are a sales agency for coal.

Q. Is your organization a sales agency for the Benedict Coal Corporation?

A. Yes, sir.

Q. What is your position with the Holmes-Darst Coal Corporation?

A. Sales manager.

345 Q. Mr. Rudisail, there has been evidence in this case concerning a period of May 18 to May 27, and there has been evidence concerning—

Mr. Kramer: What year?

Q. —1953—of a certain Lake order. Could you have any records or did you which would indicate the order or orders that Benedict Coal Corporation may have had at that time for Lake shipment?

A. Yes, sir. I have one order which covered shipments for the Lake season.

Testimony of Fred Rudisail

Q. Do you have it with you, sir?

A. Yes, sir, I do.

Q. Could you refer to it, sir?

A. Yes, sir. Excuse me. I accidentally left that in my briefcase in the witness room.

Mr. Winston: Mr. Darst will get your briefcase.

The Witness: I have the order now, sir.

By Mr. Winston:

Q. What does that indicate as to whether or not Benedict had such an order?

Mr. Kramer: We object to that, your Honor. The order is here and it will be filed and speaks for itself.

The Court: That is a matter of convenience. Let him read it.

Mr. Kramer: I have no objection to reading.

346 The Court: That is just to save time. Let him answer. Let him read from the order.

A. We had for shipment during the week of May 18th one thousand tons of stoker on this order. We only shipped a total of two hundred and maybe three or four tons on that release and the rest of it we were unable to ship because the mine was not operating.

By Mr. Winston:

Q. You say we shipped?

A. I mean the Benedict, excuse me.

Q. How much did they ship on that order?

A. About 203.90 tons.

Q. What was the total amount of that order?

A. The total amount was one thousand tons for that period.

Mr. Kramer: Let me ask: where does that show on the order?

Mr. Winston: That is a good question.

By Mr. Winston:

Q. Could you come to the jury and show the jury where it shows on the order.

Testimony of Fred Rudisail

A. May I explain a little bit about that, if you don't mind?

Q. Yes, sir.

A. Orders, and this is an order to one of the many
347 Lake receivers, they are begun in the Lake season, which means they usually begin some time in April and run through the Lake season which is from mid-March up through November 15th, and during that season your tonnages are released.

Say you have a 20,000-ton order and each week, or every two weeks, so many thousands of tons will be released on that order depending on the boats as they arrive at the lakefront.

If the shipments are late you run into charges on boat demurrage; if shipments are early you consequently run into charges on the demurrage for the coal getting there too soon.

Q. You spoke of a thousand-ton order. During what period of time was Benedict to have filed that order?

A. They were to have shipped that number of tons the week of May 18th.

By Mr. Kramer:

Q. Does that show on the order?

A. Yes, sir. We release the compartments on the tonnages as we receive them—we release them on the order itself.

Mr. Kramer: I want to state to the Court our reasons for these questions.

The Court: You may.

Mr. Kramer: There were pre-trial depositions taken.
348 A request was made for this information. We were advised, and I hold the advice in my hand, that this information was not available and could not be obtained, and that notice was given to us months ago; therefore, we have had no opportunity to prepare for this.

Testimony of Fred Rudisail

We asked for it and we were informed it was not available and could not be obtained, and I have it in my hand.

Mr. Winston: I am glad he brought that point up. As I recall the request was for all orders that had been cancelled, isn't that correct?

Mr. Kramer: No. "In reply to your request for a list of orders furnished the Benedict Coal Corporation, as well as a list of orders which were cancelled," they are not available.

I have not read it in full but there it is, and it is signed by the witness that is on the stand, your Honor. We have had no opportunity—I think perhaps under the rule, I have not checked, perhaps this cannot be objected to—but we have had no opportunity to prepare for this type proof and we were refused it.

This is the first notice we have had it was available.

Mr. Winston: What exhibit is that, sir?

Mr. Kramer: It is a part of Exhibit "A" to Mr.
349 Darst's deposition.

Mr. Winston: Your Honor, may I read the request here, on page 114 of the deposition:

"Mr. Rayson: It is agreed that as Exhibit 'J' the defendant will furnish a list of all orders received during the period of this litigation, and that the defendant will indicate all of such orders that were cancelled. With respect to orders cancelled, the defendant will indicate further all such orders as were cancelled as a result of a specific alleged strike where available. Where the defendant contends that a particular order was cancelled as a result of particular alleged strike, the defendant will furnish the name of the corporation or person to whom such coal was to have been shipped."

Mr. Kramer: Your Honor, I want to read his reply to that. This is the deposition of Mr. Darst and it was taken and I do not have the Exhibits but it was agreed at that

Testimony of Fred Rudisail

deposition that that would be furnished. Here is what we got.

A copy of a letter written on August 30, 1955, to Mr. Guy B. Darst, Vice-President, Benedict Coal Corporation, St. Charles, Virginia.

350 "In reply to your request for a list of orders furnished the Benedict Coal Corporation, as well as a list of orders which were cancelled, during the period March 6, 1950 and July 31, 1953, our records are kept in such fashion as to make it impossible to comply with your request since after completion, or other final disposition, mine orders from all mines for whom we sell are intermingled thus making it a practical impossibility to, with accuracy, segregate orders for any one mine.

"Sincerely yours,

"Fred Rudisail,

"Sales Manager."

That is the information we were given in response to the effort to obtain this and we assumed the accuracy and went no further.

The Witness: I have a copy of that letter, sir, and I believe he omitted a word or two from that letter.

Mr. Kramer: Did I?

Mr. Winston: I didn't follow you.

Mr. Kramer: I am willing for the witness to state any words I omitted.

The Witness: Does not the letter read "Since after completion, or other final disposition, mine orders from all mines for whom we sell coal are intermingled thus making it a practical impossibility to, with accuracy, segregate orders for any one mine."

351 Mr. Kramer: That is correct, except you have inserted one or two words that are not in it. You inserted the word "coal."

Testimony of Fred Rudisail

The Witness: You are correct. I did add the word "coal". You are correct.

Mr. Kramer: And I read the whole thing just as it was with the exception of the word "coal" which you inserted?

The Witness: I did not understand the word of "practical impossibility."

Mr. Winston: A practical impossibility.

Mr. Kramer: Yes, sir.

The Witness: May I explain that?

Mr. Winston: Yes, sir.

The Witness: The company with whom I am affiliated is the Holmes-Darst Coal Corporation. We sell coal for other producing companies than the Benedict Coal Corporation. The orders, when they are either cancelled or filled or other disposition is made of them, we file them alphabetically not by mine, and to take our files and go from A through Z and segregate the orders for Benedict exclusively for periods of time asked, would have required many, many hours and considerable labor and expense.

Now the reason I am able to have one or two of these, is that these were my so-called personal accounts. I 352 did remember these specific accounts because they had been my accounts throughout the years.

By the Court:

Q. Well, why didn't you give that to Mr. Kramer, or whoever wrote you the letter? Why didn't you give it to him then?

A. I understood they wanted all the orders for the entire period, and that was the reason I wrote that letter. I did not want to say I just have one or just have two when the request was for all of them.

Q. How long would it have taken you to have attached all of them during the period that is involved?

A. This would be only an estimate, it would have taken—

Testimony of Fred Rudisail

Q. In your judgment about it.

A. It would have taken three or four people from a week to two weeks of solid searching.

The Court: The objection is overruled. He may answer the question. Go ahead:

The Witness: Would you please repeat your question.

Mr. Winston: What was the last question?—

(The question was repeated as follows:

“You spoke of a thousand-ton order. During what period of time was Benedict to have filled that order?”)

Mr. Kramer: If that is your writing, I assume it is, and in view of that I want to ask the best evidence
353 be introduced and the written instrument be introduced.

By Mr. Winston:

Q. Do you have the written instrument?

A. Yes, sir.

Q. Will you introduce it?

A. Yes.

Mr. Winston: Your Honor, if counsel will permit this, if we could have it photostated and either leave the photostat—

The Court: Without objection you may do that.

Mr. Kramer: Of course, we have no objection. We should have a copy of it. Just a minute, please, your Honor.

By Mr. Kramer:

Q. There is just one question. Is the top sheet—there are several sheets glued together; fastened together some way, the top sheet itself is what you call the order?

A. Yes, sir.

The Court: You may proceed.

(Exhibit No. 18 was filed.)

Mr. Kramer: The exhibit file consists of how many pages or sheets?

Testimony of Fred Rirdisail

Mr. Winston: Five, together.

By Mr. Winston:

Q. What type coal was it, sir?

354 A. That was for stoker coal. By that, I mean it is a size of $\frac{3}{8}$ ths by one.

Q. How long would that have taken Benedict to fill completely?

A. Approximately three days—three working days.

Q. That is complete?

A: Yes.

Q. What happens when a mine loses an order like that?

A. Well, it is gone; it is lost.

Q. Can the mine operate after that?

Mr. Kramer: I object to that. He is not an operating man at all. I don't see how he could know it.

By the Court:

Q. Do you know the answer to that question?

A. Your Honor, yes, sir, but I don't think an answer I might give is a justifiable answer.

The Court: All right. The objection is sustained.

Mr. Winston: You may cross-examine.

Cross-Examination,

By Mr. Kramer:

Q. Well, you say Benedict Coal Corporation was a personal client of yours?

A. No, sir, the Benedict Coal Company is not a personal client of mine.

Q. Who did you mean was a personal one of yours?

355 A. I don't believe I stated, sir, anybody was a personal one of mine; that I handled some clients personally.

Q. You said, I understood you when you talked to his Honor, you handled this transaction personally and that is the reason you knew about it.

Testimony of Fred Rudisail

A. Yes, sir.

Q. Now, of course, you knew that when you wrote that letter which was to be furnished to us last August, didn't you?

A. Yes, sir.

Q. And yet you did not furnish us that?

A. Sir, I explained once or twice the request made to men was for all orders and I did not figure piecemeal was what they desired.

Q. But you made no explanation that you could furnish part of them?

A. No, sir, I did not, since the request asked for all orders.

Q. You were not told by anybody not to furnish these to us?

A. No.

Q. The only excuse you have is that because you were told to furnish all, the way that question was framed, you did not think you needed to furnish any?

A. I felt I should comply with the request in full or
356 else decline piecemeal.

Q. I did not notice anything in this letter about "I can't furnish it in full, therefore I won't furnish it piecemeal." You did not think to put that in the letter, did you?

A. Sir, in the letter I state, "In reply to your request for a list of orders furnished the Benedict Coal Corporation," which in my opinion means all orders.

Q. You did not say, "I enclose herewith a partial list," or anything of that sort?

A. No, sir, I did not.

Q. But you were able to find the very one that the cross-plaintiff, Benedict Coal Corporation, wanted as soon as you begin looking for it, didn't you?

A. I have two additional ones as well,

Testimony of Fred Rudisail

Q. Did you bring them with you?

A. Yes, sir, I did.

Q. Did you get a subpoena duces tecum—do you know what I mean by subpoena duces tecum, a subpoena to bring with you certain written papers?

A. I received no subpoena of any kind.

Q. Just in response to such a request that was made to you by us previously, you produced that paper this time. When did you first show the paper I now hold in my hand, which is Exhibit No. 18, to either Mr. Guy

357 B. Darst or to his attorney?

A. Approximately 10 days to two weeks ago.

Q. They have known for at least ten days or two weeks ago you had this?

A. Yes, sir.

Mr. Kramer: I am sorry, it will take just a moment, your Honor.

By Mr. Kramer:

Q. There are a number of notations on the various pages of this collective exhibit, and on the first of which, which as I understood you a while ago is a copy of what you say was the sales order?

A. Yes, sir.

Q. It shows that the order was received on, is this right, April 6, 1953?

A. Yes, sir.

Q. One of these dates, at various places on the back of these different sheets, the date of 4/17/53, there is a typewritten note here and on 4/27/53 another typewritten note.

A. Those are instructions that have gone to the mine regarding shipments to be released on that order.

Q. What are these various red and blue ink figures?

358 A. Those are just office records, more or less, that we have to keep the car numbers. We put them on the back of those orders in order to keep a record of the releases to be sure we fill it in time.

Testimony of Fred Rudisail

Q. You mean those were the ones they sent you?

A. That is correct.

Q. And when I say "they" I mean the Benedict Coal Corporation?

A. I understood you to mean—yes, sir.

Q. When it says in here at various places to be "on wheels" by a given date, it means on wheels at the mine?

A. It means loaded and shipped by that date, or loaded by that date to be pulled by the railroad the following morning.

Q. When you say loaded, you mean loaded on railroad cars at the mine?

A. Yes, sir.

Q. What do the letters "EPA" followed by the sentence "To mine's today," all of that being in parentheses?

A. EPA stands for E. P. Avent, who is executive vice-president of our company in our Cincinnati office.

Q. Are these records made in your office or the Cincinnati office?

A. The releases are sometimes given by phone and confirmed that date by letter. Sometimes they are written by letter to the mine from our Cincinnati office and we get a copy of that letter in that office so that we can
359 make a notation on those orders, and then in turn see the shipments are made.

Q. Did you get this paper you have filed as Collective Exhibit No. 18 out of your office or Cincinnati?

A. That is our Knoxville office copy.

Q. Such figures as "5-7" written in with pen which I find on page 4 of this exhibit—under the typewritten notation, the one we have been talking about—

A. Yes.

Q. —was put on to show the date of shipment?

A. That is correct, sir. The date is the fifth month and the 7th day. That "L&N" means the initials of the car

Testimony of Fred Radisail

and the number, 67738. That is supposed to be the actual number of the car that went forward.

Q. So that although this statement on here to ship the 1,000 tons during the week of May 18th, you made the first shipment on May 7?

A. No, sir.

Q. And made the next shipment on May 8?

A. No, sir.

Q. And then made another on May 9?

A. No, sir.

Q. And another on May 16?

A. No. Those were on the release—the May 46—I would like to explain why it shows—

360 Q. Let me ask you a question and then you may explain.

Those figures I have read appear directly under the item "Ship during week of May 18th, 1,000 tons," that you testified about a while ago, don't they?

A. They appear underneath it but I would like to explain to you why they are in that fashion.

Q. All right, go ahead.

A. Let's start back at the very beginning. Would you watch with me, sir, please.

Q. I will do the best I can without having a chance to examine it ahead of time.

A. You have a thousand-ton release here, which is approximately 20 cars. If you count up 20, you will see that covers that very release.

Then coming to April 27, we had a two thousand-ton release which takes—you notice they were started on the 28th, the 29th, 30th, May 1st, May 4th—

Q. The trouble is nobody can tell from this what that order applies to, under what you have been talking about, do they?

A. I wish you would ask the question again, I did not understand you.

Q. These don't appear, the entry you are now talking about, the very first entry, does not appear under the type-written statements above, do they?

361 A. No, sir, they don't appear at all times directly underneath because suppose today I got notice to ship so many thousands of tons to someone. I make a note in the available space underneath that order so I will have a note to know that it goes.

It may be that I have shipments to be made on a prior release which are being posted after I wrote that note.

Q. Just know roughly how many cars there are and how much coal by their approximate capacity?

A. That's right.

Q. You don't leave enough space on that to make proper entries for the cars?

A. I have help and there is a human factor involved in that sometimes they are not going to skip enough space so that they may crowd.

Q. And may crowd everyone of them in.

A. No, sir, I wouldn't say that. Here is a release of 1,000 tons, approximately 20 cars. You notice this mine shipped on the 24th. We did not get the release for the additional one until April 27th, which I had time—we had space left for what was going to happen to come.

Q. That is not involved in this litigation.

A. That is correct, but I am trying to explain to you why in this fashion.

Q. When you get down to cars involved in this
362 litigation, there was not enough space left?

A. No, sir. Well, sir, I would like—

Q. Go ahead, explain.

A. May I go back a minute, go back to the week of April 27th.

We had a release of 2,000 tons, 40 cars of coal, approximately. We started shipping on that release the 28th of April, and I wish you would look at that—

Testimony of Fred Rudisail

Q. I am not interested in that.

A. Go ahead, and if you don't look at it I can't make any explanation.

Q. Will you watch with me, I am interested in—

A. We started on the 28th and shipped currently, as you see, the 28th, 29th, 30th—we kept on shipping and come down here on the 5th and 6th. It took us through the week of the 9th to complete that release. We kept right on shipping, the 5th, 6th, 7th, 8th, and 9th.

Q. And that is the place where you begin carrying over to other dates and other places where we are involved in this litigation.

A. No, I am not carrying over on another date, no, sir.

Q. You are over this date?

A. Yes. This is a note put on to be sure we shipped the coal.

Q. All right. Well, let me ask you one other question, prior to that all the shipments were made under the dates they were supposed to be made under, as you pointed out a minute ago?

A. Just a minute, sir. Yes, sir. When you have as much as two weeks between releases—

Q. I didn't ask you anything about two weeks.

A. But I am trying to explain to you why it appears in that fashion.

Q. Of course, you did not know anything about the mine—or did you get word the mine shut down—during this period I am talking about, this May period?

A. I received word on May 18th.

Q. May 18?

A. Yes, sir.

Q. Did you receive word on May 20th the mine was ready to operate again—on May 19th, and ready to operate on the 20th or on the 20th it was ready to start operating?

A. I can't answer that whether I did or not. I do not

Testimony of Fred Rudisail

remember whether I did or not, and the reason I answered the first question in the affirmative was when a mine is on strike I am constantly in touch with every mine every day, Benedict included, and I knew what was going on every day at that mine and I did know on the 18th that the mine was down.

Q. But you don't know when you got word it opened up?

A. I can't say when I got word, that would be—

364 I don't remember being advised any specific date.

Q. I notice on the other item, my attention has now just been called to the next item on this paper following the one of May 7th which you say involved the period in this work stoppage. The next one was on May 29, 1953.

A. Yes.

Q. Ship a thousand tons, the same as in the previous but the date of shipment is different. The shipment made under that order, and I assume that was from the Benedict mine, was it?

A. Yes.

Q. Was on what date?

A. June 1. I would like to—

Q. And how many cars were shipped on June 1?

A. Five cars were shipped on June 1.

Q. And then were any shipped on June 2nd?

A. Yes, sir.

Q. How many?

A. Two cars, and so forth until all the order was completed, or until the release.

Incidentally, I would like to call your attention to something that will aid in backing up my statement made earlier. You will notice here on the 29th—we got this release on June 2nd, we got this one, and see how that order is divided again?

365 Q. I notice that change was made just as of the date of the trouble we are involved in and not prior to, is that not correct?

Testimony of Fred Rudisail

A. No, I wouldn't say that.

Q. What is your recollection of it before?

A. Could there not possibly have been some trouble——

Q. I am not arguing with you.

A. But you made the statement——

The Court: Gentlemen, let's get back to our seats and let's examine this witness. Do not volunteer anything, Mr. Rudisail. Let's conduct the trial like it ought to be conducted.

By Mr. Kramer:

Q. Are you in charge of the Knoxville office of the Holmes-Darst Sales Agency?

A. No, sir.

Q. Who is in charge?

A. Mr. St. John Reynolds, President.

Q. He is president of the corporation?

A. Yes.

Q. You maintain offices at Knoxville and in Cincinnati?

A. Yes, sir.

Q. Is Mr. Guy B. Darst in your office frequently?

A. Mr. Guy B. Darst's office is in our office.

Q. In other words, Mr. Guy B. Darst has an office——

366 A. I beg your pardon, I am sorry. I have confused Mr. Guy B. Darst with Mr. Guy Darst, Sr. Mr. Guy B. Darst does not have.

Q. Mr. Guy Darst, Sr., is the father of Mr. Guy B. Darst and also connected with the coal corporation and has an office in the same room where your office is?

A. Mr. Guy Darst, Sr., does.

Q. I believe, or do you know he is the president of the Benedict Coal Corporation?

A. Yes, sir.

Q. You never discussed with him the question of this letter, furnishing records, I assume, or did you? You

Testimony of Fred Kuaisai

know, this letter, this request you had to furnish information. Did you discuss that with Mr. Guy Darst, Sr.?

A. No, sir, I did not.

Mr. Kramer: That is all.

Redirect Examination, by Mr. Winston.

Q. I believe you spoke of two others you have. Do you have them with you?

A. Yes, sir.

Mr. Winston: These are two others, sir, we will give you for your inspection. (Handing to opposing counsel.)

Mr. Kramer: I don't know, of course, I guess they
367 are involved in the period of litigation, I don't know. But go ahead, I will not delay until we see what they are.

By Mr. Winston:

Q. I hand you two others—I don't know what you want to call them. I ask you what they are, sir?

A. They are orders, sir.

Q. What is the first one?

A. The first one—

Mr. Kramer: I object unless counsel states they are involved in this litigation.

Mr. Winston: That is my understanding.

Mr. Kramer: If you will state they are involved in this period of time in litigation, and there has been some mention about failure to deliver, and if you state that as a lawyer then I do not make any further objection except the general objection I have had that they were not disclosed to us on pre-trial.

Mr. Winston: They are involved this period of litigation.

Mr. Kramer: I am still keeping my general objection to it then, your Honor.

The Witness: This, sir, is a three thousand-ton order

for Carbon Coal, a broker, on the 30th of April, 1953,
for shipment at not more than 12 cars per week—
368 Mr. Kramer: There has been no evidence in this
record by Mr. Darst, who testified in full, that there
was any loss of an order in connection with that concern
that he has mentioned.

The Court: Now if that is correct, Mr. Winston, what
relevancy does that have? What is the purpose of intro-
ducing orders which do not pertain to the litigation?

Mr. Winston: Let me ask this:

By Mr. Winston:

Q. Was that order filled by Benedict?

Mr. Kramer: I object to whether it was or whether it
was not.

The Court: Is the Benedict claiming any alleged damage
by reason of the alleged non-fulfillment of either of those
orders?

Mr. Winston: Well, on our chart, I don't guess it would,
sir.

The Court: I sustain the objection.

Mr. Winston: Correction. On one of them it would,
wouldn't it, Mr. Darst? I believe on one of them it would.
The second one.

Mr. Kramer: The one you are talking about is the first
one, and you said it has no application, and why the
second?

369 By Mr. Winston:

Q. What is the second one, sir?

A. An order on May 1, 1953, for five thousand tons of
Benedict No. 10 seam, one inch.

Q. No. 10. Do you know what company was mining—

The Court: Are you, Mr. Winston, examining him about
the order?

Mr. Winston: This is the second one.

The Court: I mean, can you ask him questions back at
the regular place?

Mr. Winston: I would like to be able to look.

The Court: After you finish with your questioning about the order, then I ask you to go back to the counsel place.
By Mr. Winston:

Q. What is the date of that order?

A. The date of the order is May 1, 1953.

Q. Do you know if Benedict had any other company operating or fixing to commence to operate up on their property at that time, on the No. 10 seam?

A. Swisher, of course. Ura Swisher; or either Swisher Coal Company, Big Mountain, whatever heading it took.

Q. What period of time did that order cover?

A. The order covered shipment each week over the month of May, 1953.

370 Q. Was that order filled, completed?

A. No, sir, it was not.

Mr. Winston: We offer that in evidence.

The Court: All right.

(Exhibit No. 19 was filed.)

Mr. Winston: That is all.

Mr. Kramer: May we have a minute, your Honor?

The Court: Yes.

Mr. Kramer: May it please the Court, we do not want to delay but I would like to reserve cross-examination until I have had a chance at recess to look at this.

By the Court:

Q. What is the amount of that order, Mr. Witness?

A. The amount of the order is for five thousand tons.

Q. How much of the order was filled?

A. 39 railroad cars were applied on it. Those cars average 55 tons a car, which would mean that around 2,200 tons were shipped on the order.

Mr. Kramer: I am not going to take time to study it now. I want to reserve asking the witness, and ask him to stay until we can check it.

Mr. Winston: That is all then.

The Court: Mr. Marshal, advise the witnesses not to leave unless they are excused by both sides to this
371 litigation.

The Witness: Thank you, sir.

372

JAMES SCOTT,

called as a witness by and on behalf of the defendant-cross-plaintiff, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Winston.

Q. Your name is James Scott?

A. It is.

Q. Where do you live?

A. St. Charles, Virginia.

Q. How old are you, sir?

A. Thirty-one.

Q. What is your business or occupation at this time?

A. Chief of Police.

Q. Where?

A. St. Charles.

Q. Do you also do any work for the Benedict Coal Corporation?

A. I do.

Q. What do you do for them at this time?

A. Well, I go over at night and make rounds through the camp.

Q. Night watchman?

A. Just watchman.

Q. Are you watchman for any other company around
373 there also?

A. Well, for Bonny Blue Coal Company, and Emma Jean, Virginia Lee.

Testimony of James Scott

Q. Were you formerly an employee in the mines of the Benedict Coal Corporation?

A. I was.

Q. When did you go to work for them originally?

A. Well, it is somewhere along '50, I guess. 1949, 1950.

Q. What work did you do in the mines?

A. I loaded coal.

Q. Were you a member of the United Mine Workers of America?

A. I was.

Q. What local did you belong to?

A. 28.

Q. Was that the district?

A. District 28.

Q. Was it the Benedict local you belonged to?

A. Benedict local.

Q. Did you hold any position with the Benedict local?

A. I was on the mine committee.

Q. How long were you a member of the committee, sir?

A. Well, I was there something over a year.

Q. Do you recall when you went to work there as a
374 miner in the Benedict?

The Court: He said 1950. Are you asking him for the month?

Mr. Winston: I thought he said '49 or '50.

The Court: All right.

By Mr. Winston:

Q. How long did you continue to work as a miner with Benedict, do you remember?

A. Well, I worked there, I guess, altogether, around, I would say anywhere from three to five.

Q. Three to five what?

A. Years.

Q. Now, sir, during the period from March of 1950 thereafter that you were working there, I will ask you whether

Testimony of James Brown

or not there was some strikes in the mines of the Benedict Coal Company?

A. There was some strikes there.

Q. Do you recall how many?

A. No, I can't. I can't recall just how many there was.

Q. Now, talking of the strikes, I will ask you whether or not you recall a strike that occurred, according to the record, on April 14 and 17, 1950, over the laying off of men of No. 7 mine, a lay-off strike?

A. That was over, they wanted to place some men in
375 No. 5 and 9, I believe it was at that time, that they struck over.

Q. What had happened to No. 7 mine at that time or prior to that time?

A. Well, they was shutting down. I don't know just exactly whether it was working out or what it was, but anyhow it was stopping.

Q. Did the men who were laid off in No. 7, did they get jobs elsewhere or were they placed elsewhere?

A. They placed the ones they could.

Q. Was there any disturbance between the union there and the company over that lay-off and placement or manner of placement?

A. Well, just strike, stoppage, would be all. I don't know how many—how long that was.

Q. Did they have a strike or stoppage during that dispute about the lay-off of the men at the No. 7 mine?

A. They did.

Q. Why did your local strike?

A. Well, because they wouldn't put them to work.

Q. Was the field representative of District 28, did he come down to the mines, to the local at that time?

A. He did.

Q. Who was the field representative?

A. It was Bud Clarke, and Scroggs was down on that.

376 Q. Now you spoke of Mr. Scroggs. During the time of that strike or disturbance did he confer with you or any member of the local that you know of?

A. He did.

Q. What did he tell you?

A. Well he told us, he says, "Boys, I can't tell you"—he says, "I can't tell you boys when to strike. I can't come out and tell you to strike, but when I tell you when you don't get what you want why you boys know what to do then."

Q. Did he tell you that at that time or prior to that disturbance?

A. Well, I don't remember whether right at that time or not but he told us that several times. He told me that.

Q. At that particular strike did he advise you as to whether or not you knew what to do?

A. I can't remember right off whether he did or not at that strike.

Q. Had he given you that type of instructions before that strike?

A. Well, he had given it to us—given it to me several times.

Q. What was that, sir.

A. He just told us when we didn't get what we wanted we knowed what to do, and he said "I couldn't tell
377 you to strike," but we knowed what to do by that.

Q. What did you understand him to mean when he said, "You know what to do."?

Mr. Kramer: I don't believe the witness' understanding is admissible. We object to that.

By Mr. Winston:

Q. What did he mean when he said, "You know what to do"?

Mr. Kramer: I object to that on the part of one man knowing what another one means.

The Court: If he knows that language he may answer the question.

The Witness: Well, we knowed, when he told us that we knowed to strike.

By Mr. Winston:

Q. And he stated, "If you don't"—

Mr. Kramer: I object to that as repetitious and leading, your Honor.

The Court: Well, have you finished your question? I didn't hear what the question was.

By Mr. Winston:

Q. Were you on strike over that lay-off dispute and did Seroggs come down?

A. Which strike was that?

Q. In April. The one over the lay-off of men at 378 No. 7.

A. We were on strike when they come down.

Q. And do you remember what Seroggs told you or advised you?

A. Well, not right at that I did not, that particular one.

Q. Do you know what the result of that particular strike was?

A. We finally went back to work after a day or two, but I don't remember just what they done about placing the men, but I know they went back and placed the ones they had room to place at back to work.

Q. Do you recall any strike over the water situation at Benedict in 1950?

A. I do.

Q. What caused that strike?

A. Well, the water went dry over there on the other side where it was coming through the mines and they offered—they were trying to get water at the camp at that time and they come out and struck.

Q. Why did they strike?

A. Well, they struck because they didn't have any water. I think that there was some of the miners were bathing in camp and they struck because they were bathing and wanted them to cooperate so they could
379 have water and the water went dry.

Q. Do you know how many strikes you had over water?

A. There was three or four, I would say.

Q. What caused the men to go back to work?

Mr. Kramer: I just want to state that this proof is there is one strike over water. Are you changing your position that there is more than one strike?

Mr. Winston: No. We have made the claim throughout this case there were lots of other strikes other than those, but the only ones we have listed there are the ones which we are claiming damages for.

Mr. Kramer: We object to any evidence of any others.

Mr. Winston: In reply to Mr. Kramer's position, he says that we just allege one strike over water and we say there were more. My position is, and it has always been, there are lots more strikes than we are claiming damages for, but these other strikes were at such times that we were not damaged.

The Court: Is the purpose of that testimony to undertake to connect the representatives of District 28 and the International Union with those for which you are not claiming damages, is that the sole purpose of this testimony?

Mr. Winston: Well, it shows the pattern.

The Court: Well, by the pattern—do you say to the Court that you expect to connect representatives of
380 District 28 and the International with these that are listed on your chart and for which you are claiming damages, is that the purpose of it?

Mr. Winston: Well, that would be part of it, sir.

The Court: Well, then it may be considered by the jury for that purpose but it will not be considered for any purpose unless the District 28 and the International are connected with those work stoppages.

Mr. Kramer: In view of that, we ask the Court then, so it will shorten the time, to limit any questions to those which they say will throw light on that.

The Court: The testimony is so limited. If the International and its district are not connected then I direct you not to ask the questions.

By Mr. Winston:

Q. How many times during that period did Mr. Scroggs advise you or suggest to you that you strike, during the period 1950 to 1953?

A. I couldn't say just how many. It was several different times.

The Court: Wait just a moment. I did not catch the last question.

(The last question and answer were read.)

The Court: All right.

381 By Mr. Winston:

Q. I will ask you if Mr. Scroggs or any district representative ever punished you or the local for striking during that period?

The Court: That only applies, you can ask him under the original contract which ended in 1952.

Mr. Winston: I will rephrase that question.

The Court: It is not competent for any period of time after 1952 because that provision was changed in the amended contract of 1952.

Mr. Winston: Yes, sir.

The Court: You may ask him during that period of 1950 to some time in 1952.

By Mr. Winston:

Q. I will ask you if during the period from March,

Testimony of James Scott

1950, through September, 1952, if Mr. Scroggs or any District 28 agent or officer ever punished you or your local for striking?

A. Not that ever I knowed of.

Q. Did Mr. Scroggs or any such agent or officer during that period of time tell you not to strike?

A. They never did tell us not to strike.

Q. If they had told you not to strike would you have not struck?

A. Well, if they told us not to we would.

382 Q. Did they ever during the period of time from March, 1950, through May, 1953, tell you all to arbitrate your disputes with the company?

A. No. They just told us, the only way they told us, when we didn't get what we wanted we knowed what to do.

Q. Do you recall a strike over vacation pay?

A. I do.

Q. Was Mr. Scroggs down during the time of the strike or dispute over that?

A. He was.

Q. What did he tell you at that time during that dispute or strike?

A. Well, he told us to collect the vacation pay they, the company was holding. Where they owed the company, the men owed them their pay, if they owed them \$50.00 they would hold fifty and give them fifty in cash—forty-eight, whatever it was.

Q. Do you recall a strike in 1951 over a dispute over discontinuing credit to the men?

A. I do.

Q. To some men that had been cut off. What was this dispute over?

A. Well, that was over where they were crediting the men and the company cut the credit off. They said they

383 couldn't give them credit any longer and the district, the local, we went and took it up and stood good for the grocery debts and they went to issuing again after the strike.

Q. Did the district or any other agents or representatives from March, 1950, through September, 1952, ever reprimand you or your local for these strikes?

A. No.

Q. Did you know a man by the name of M. M. Campbell?

A. I knowed him.

Q. Do you recall when he had a contract to do some work there on the Benedict property?

A. He was doing construction work there at that time.

Q. Do you recall the occasion of his signing a contract with the union?

A. He signed up, and he was there about two months before he signed the contract and they struck over him and he finally—and they took him in and he signed it then.

Q. Was there any dispute over this Campbell job before—I believe you said they struck. Was there any dispute before that?

A. There was. They cut off some men at No. 5 and they had asked him to place the men that they cut off, let Campbell place them on that construction job, and he said they wasn't any of them qualified to do that kind of work.

Q. What type work was it Mr. Campbell had?

384 A. Well, it was putting up a tippie—I mean, something like a tippie. Wasn't exactly a tippie for a chute. A drag line.

Q. And these men that were laid off at No. 5, what type trade did they follow?

A. Well, some of them were coal loaders and some of them track men.

Q. Track men and coal loaders?

A. Different jobs, motor men.

Testimony of James Scott

Q. Was Mr. Seroggs down at the Benedict property during the dispute with Mr. Campbell?

A. I don't recall him being there at that time.

Q. That is, before the strike. To refresh your memory I will ask you if you recall any meeting in Mr. Darst's office at which time Mr. Campbell was present and Mr. Seroggs present?

A. He was there in the office. I understood you to say was he at the mine.

Q. He was in the office?

A. He was in the office.

Q. Do you recall how many strikes there were over Mr. Campbell?

A. Well, just to say how many there was, I couldn't.

Q. Well, let me ask you this: Was there a strike over Mr. Campbell before he signed the contract?

A. Before he signed it? I believe there was. I
385 wouldn't say for sure but I believe there was.

Q. Was there also, after he signed the contract, was there another strike over Mr. Campbell?

A. There was a strike after he signed the contract.

Q. What was this second strike over, the one after he signed the contract?

A. Well, it come up over the men, over about placing them to work; wanted him to place the men cut off there and they kept striking.

Q. Did Mr. Seroggs give you, your local or you, any advice or talk to you during the time of this Campbell dispute?

A. No more than he would ever give us. Just when we didn't get what we wanted we knowed what to do.

Q. What was his position about the placement of the men on Mr. Campbell's job?

A. Well, he just wanted us to see that they were placed.

Q. Now, would your committee ever call any of these strikes?

A. Yes, they called strikes.

Q. Are they the ones that called them?

A. Mullins, he called several of them.

Q. What was his position?

A. He was mine committeeman at that time.

386 Q. He was on the same committee you were?

A. Yes.

Mr. Winston: You may cross-examine.

Cross-Examination, by Mr. Kramer.

Q. Mr. Scott, did you have a falling out with the Union?

A. No, sir.

Q. Never had any disagreement with them?

A. Well, I wouldn't call it that but—

Q. Well, we call a disagreement, maybe we don't use the same words.

A. We were all in the local in the Union. There was about four officers. I was one, and when I come down why I went to policing in St. Charles. They come down and told me, "When you throw our men in jail that is when you go out of the local." After that I had to lock some of them up, and they called me up and told me I would have to turn my card in.

Q. In other words, you quit your work at the mines, you quit working in the mines?

A. No, I didn't quit. I was cut off.

Q. You took full time employment, a job to do something else, didn't you?

A. No. I was on the panel.

387 Q. What?

A. When you are cut off you take the list and put your name on it and if you are the oldest man they call you back.

Q. What they took from you was not your union membership but your hospitalization card, wasn't it?

Testimony of James Scott

A. They took it away from me.

Q. Not your union membership?

A. No, they didn't take that but they took my card.

Q. You said a minute ago they put you out of the Union?

A. I mean they took my—of course, I wouldn't have any business in there if I couldn't get nothing back out of it.

Q. They took your hospitalization card and on the theory you had gotten you another full time job and working outside of the coal mining industry in accordance with the regular regulations of the organization?

A. Well, there was a fellow helping me—I had a man helping me and he belonged over there and they left his.

Q. He was working part time?

A. He was working full.

Q. And you became dissatisfied—how long ago was that?

A. Well, that has been about, I would say about the
388 middle of 1952.

Q. And then was it that Mr. Darst's company employed you as a watchman at its mines, another job outside the organization?

A. That happened about the same time.

Q. You had been a member of this mine committee along with Mr. Mullins and who else?

A. Homer Gibson.

Q. Did anybody else serve as a member of the mine committee at that time while you were on it besides Mr. Gibson and Mr. Mullins?

A. Yes, there was, Turner was on it, but that was at No. 9.

Q. Turner was on at one time. Ordinarily these mine committees consist of three men?

A. Three.

Q. Was there anybody else that served any time as a third man?

Testimony of James Scott

A. Well, there were several times we picked maybe somebody up.

Q. Can you name any of those?

A. I can't recall who it was.

Q. Mr. Turner that you referred to is dead?

A. He is dead.

Q. Can you name anybody else that was on the mine
389 committee at any time you were on it?

A. Well, no, I couldn't.

Q. Do you know Fred Tyler?

A. Fred Tyler. Fred was on it.

Q. Fred Tyler was on it during part of the time and served as a member?

A. I had forgotten about Fred. He was on there.

Q. Was Dana Muncey on any time while you were on?

A. Not that I can remember, he wasn't.

Q. Was Harve Edwards?

A. I believe he was.

Q. You know Harve Edwards. Do you think he was on part of the time you were on?

A. I believe he was on at that time.

Q. Mr. Lynn wasn't on any time while you were on, was he?

A. No, he wasn't on.

Q. Now you have mentioned four occasions when you say there were work stoppages, I believe, and you say Mr. Scroggs talked to you some about these work stoppages or strikes. The first one you referred to, as I understand, was the one of April 14-17 which was over cut off, wasn't it—yes, over the cut off, because of opening of the new mine.

Where did you see Mr. Scroggs and hear him make any statement at that time?

390 A. Well, he made the statement at the office about once to me, about if we didn't get what we wanted we knew what to do.

Testimony of James Scott

Q. In Mr. Darst's presence?

A. He was there at one time in Mr. Darst's office.

Q. And when you say Mr. Scroggs said, "I can't tell you to come out and strike," and he said that in the presence of Mr. Darst?

A. No, he did not say that in the presence of Mr. Darst.

Q. That is what I am asking you. You said that the statement that Scroggs made was, "I can't tell you to come out and strike but if I say when you can't get what you want you know what to do." I understood you to say he made the statement in Mr. Darst's office, or am I wrong?

A. He made the statement in Mr. Darst's presence once on the strike when we were there arguing the case. He told Mr. Darst, "When these boys don't get what they want they know what to do."

Q. On which one of these disputes are you talking about?

A. I wouldn't say for sure which case it was on but to the best of my knowledge I believe it was the Taber case.

Q. When Mr. Taber had been laid off?

A. Been laid off.

391 Q. Was that the only time you heard him make any such statement in Mr. Darst's office?

A. That is the only one I ever heard him.

Q. That is the only time you ever heard him make that statement at all, wasn't it?

A. That I can remember of.

Q. The only time you can remember you say is the Taber case. He said, "If you don't get what you want you know what to do."

Now,—

The Court: He was entitled, let him answer. Mr. Kramer, let this man make an answer before you start another question. Go ahead, now.

Testimony of James Scott

By Mr. Kramer:

Q. Do you want to add something or go ahead?

A. I will go ahead.

Q. Now, where were you when you say that Mr. Seroggs made the statement, "I can't tell you to strike, to come out and strike," and then he went on with the rest of the statement you say?

A. But he has told me in his car and he has told me standing talking different times.

Q. When was it he told you in his car, made that statement?

A. Well, it was during the time I was on the committee. I couldn't say just what time it was.

Q. But you are not certain when you were on the committee, you can't give us dates for that. Can you relate it to anything else, any connection?

A. Along '50 on up to 1952, to the middle of 1952, I was on the committee.

Q. That is as accurate as you can make it. Can you give us the date when it happened in his car?

A. He told me several times standing talking, me and him.

Q. I am first talking about the statement he made to you one day in his car. Can you fix the date?

A. No.

Q. Where were you standing any time—you say you were standing talking. Can you fix the place?

A. I was standing in front of the bank at St. Charles once and he told me this.

Q. Can you fix the day?

A. No.

Q. Can you tie down to any occasion as to approximately when it was?

A. That was all I know about it.

Q. Who was with you on that occasion?

A. By myself.

Testimony of James Scott

Q. Just you and him?

393 A. Me and him.

Q. Who was with you in the car on the occasion?

A. Me and him.

Q. Just the two of you?

A. Yes.

Q. Nobody else there from the district or from the local?

A. Just us two.

Q. You stated in answer to a question asked by the cross-plaintiffs' attorney, that in the 1950, that is, April 14-17, 1950, which was the one over the lay-offs, that Mr. Clarke and Mr. Scroggs were both present.

A. They were both down on that strike.

Q. Both present when the conversation took place?

A. No, they weren't both right together when it took place.

Q. What do you mean they were both down there, at different times?

A. Well, they were both down, but Mr. Scroggs was the one come down that evening and done all the talking. Mr. Clarke didn't come in the office.

Q. Mr. Clarke didn't come in?

A. At that time.

Q. In the office meeting?

394 A. That was then at the office where they met, the company store.

Q. You mean in the office of Benedict?

A. Yes.

Q. Mr. Scroggs, as I understand you, was in the office, in the meeting with the men in the office. Mr. Clarke was there but didn't come in the office?

A. He did not come in the office.

Q. But he was there at the same occasion but outside?

A. He was outside.

Q. And both of them were field men for District 28 at that time?

Testimony of James Scott

A. They were.

Q. You talked about this credit strike. The way that was settled the local agreed, that is your local, to stand for a certain amount of credit?

A. They agreed.

Q. It wasn't the district at all, was it?

A. No, the district wasn't.

Q. I believe you have already stated Mr. Scroggs wasn't there, as far as you know, at that time, or am I wrong on that?

A. Yes.

Q. The one about the credit, the local agreed to stand for so much a day for the men until they went back to work?

A. After we went back they agreed, they went on
395 back to work.

Q. That was a matter dealt with entirely by the local?

A. That was by the local.

Q. Not by the district?

A. No.

Q. You knew about Mr. Mullins—I mean Mr. Campbell. You knew about Mr. Campbell getting a contract there?

A. Well, when he quit there, I don't remember what caused—at the time when he left I don't remember what his trouble was when he left.

Q. You don't know what the trouble was when he left. Were you ever present when there was any dispute between him and Mr. Darst over his contract?

A. I was.

Q. Tell us when was the occasion that there was a dispute between Mr. Campbell and Mr. Darst over his contract?

A. What I was talking about was the time we were in a meeting with Mr. Scroggs and me and Campbell and Mr. Darst.

Testimony of James Scott

Q. We will go to that after this. At that time there was some trouble between Darst and Mr. Campbell, wasn't there?

A. There was some trouble there by the mere fact that Mr. Scroggs was up there at that mine.

Q. Mr. Scroggs and you were there and possibly other members of the mine committee?

A. They were there.

396 Q. What I am getting at, without taking too much time, is that there was trouble on that occasion between Mr. Campbell and Mr. Darst, wasn't there?

A. I never did know of there being any between Darst and Campbell.

Q. They did not get in some argument at that meeting?

A. Mr. Campbell and Ellis Lynn was the ones that got into an argument. He had called Mr. Campbell a scab and they got into it.

Q. Of course, he was not a district officer. Ellis Lynn was a member or officer of the local.

A. He was president of the local.

Q. But not a district officer?

A. No.

Q. But you don't recall any difficulty or trouble between Mr. Campbell and Mr. Darst?

A. No, not any betwixt them.

Q. Do you remember a statement made in substance by Mr. Scroggs that when you people get through with your own argument and difficulties, referring to Mr. Darst and Campbell, then I will try to see if I can help settle this thing?

A. I never heard him say it.

Q. You didn't hear anything said like that?

A. I don't remember him saying it if he said it.

Q. You say you called some strikes?

Testimony of James Scott

397 A. Well, I never did call no strikes because Mullins went to work and they never would work after Mullins would go down and tell them to strike.

Q. You were familiar, of course, with the contract and its provision which contained this statement, were you not, that the mine committee shall have no authority or exercise any other control or in any way interfere with the operation of the mines; you were familiar with that in the contract, weren't you?

A. I was.

Q. And as a member of the mine committee you knew, and so did Mullins, you had no authority as a mine committee to interfere with the operation of the mines?

A. We all knew it. We wouldn't call any until that word come around, "If you don't get what you want you know what to do."

Q. You say that is your cause to strike?

A. Yes.

Q. And you say that that was said by Scroggs upon every occasion where there was a work stoppage, the ones you have testified about, you have testified about six now—five or four?

A. When he wanted them to strike that was what he would use.

Q. Was that language used by Scroggs on every
398 one of the six work stoppages or strikes concerning which you have testified about?

A. All the ones when I was around when he was there.

Q. You said he was there on one of them they had on March 5th, and each time he said that, is that right?

A. Well, on that, I said he was on that one but he did not come down on the water strike.

Q. He did not have anything to do with the water strike?

A. He did not have anything to do with the water strike.

Mr. Kramer: That is all.

Testimony of James Scott

Redirect Examination,

By Mr. Winston:

Q. Referring to the talk you had with him in front of the bank, I will ask you whether or not he ever made any statement to the effect he could trust you?

A. He told me, he says, "You are the only one I can trust to keep it quiet." He says, "I am going to leave it up to you," and he says, "Mullins talks too much."

Q. Why did he want you to keep it quiet?

A. He said that they can't come out and tell us to strike but says, "If you don't get what you want you know what to do." We knowed what to do. We knowed it means to strike.

399 O. Do you remember about what time that was?

A. No, I don't remember just the date. I can't remember the date.

Q. Did you have strikes after that, after he told you that?

A. We had several after that.

Q. Do you know whether or not that was previous to the lay-off strike, that the men were laid off at No. 7?

A. At 7?

Q. Yes.

A. Yes.

Q. Now, sir, do you know Mr. Arch Mooneyhan, Ernest Taber and Clint Hughes?

A. I do.

Q. Are they members of the United Mine Workers of America?

A. They are.

Q. Where do they live?

A. Clint lives about two miles from St. Charles, and Ernest Taber lives about a half mile, and that's in the neighborhood of St. Charles.

Q. I will ask you whether or not in your presence any or

Testimony of James Scott

either of them have made any remarks to you concerning your coming here and testifying?

A. They have been trying to get me—they told me
400 not to come. None of them wanted me to come over here.

Q. What did they say?

A. They told me if I come over and s'vored against the union, said I never would be able to get back in it.

Mr. Winston: That is all.

Recross-Examination, by Mr. Kramer.

Q. When was it you—you can't tell us when Mr. Scroggs you say made this statement to you, "You are the only one I can trust and I want you to keep it quiet." You say that was in a conversation in front of the bank?

A. Yes, sir.

Q. And you cannot give us the date for it?

A. No, I don't know the date.

Q. When was it you had that conversation with this man Hughes—who was the other one?

A. Hughes? I don't remember.

Q. The two men you say talked to you and said they did not want you to come over here?

A. Hughes did not have anything to say. Arch Mooneyhan and Taber.

Mr. Kramer: Where is that question? Will you find the question and read it where he named all the names?

(The question referred to was read.)

401 By Mr. Kramer:

Q. That is what I thought. You say they wanted you, you are referring to three men. You say Clint wasn't in it?

A. When he asked me about Clint, no. It was only two of them.

Q. Who were those?

Testimony of James Scott

A. Arch Mooneyhan and Ernest Taber.

Q. When did they talk to you?

A. It was Sunday that it was.

Q. This Sunday?

A. Sunday past.

Q. What they said was——

A. They told me if I come and testified against the union I would never been able to get back in the union again.

Q. As a member of the union?

A. Yes, sir.

Q. Both of them together?

A. Yes.

Q. Where were they when they made that statement?

A. There below the theatre in St. Charles.

Q. And anybody with you?

A. Yes, there was.

Q. Who was with you?

A. Grant Kennedy.

Q. I didn't get his name.

402 A. Grant Kennedy.

Q. Kennedy. Anybody else in the group?

A. No, just us. That was all. Just us four.

Mr. Kramer: You may go.

(Witness excused.)

The Court: Take a recess.

(A short recess was had.)

The Court: All right, gentlemen, you may proceed with the witness.

403

DEXTER RAINS,

called as a witness by and on behalf of the defendant-cross plaintiff, after having been first duly sworn, was examined and testified as follows:

Direct Examination,

By Mr. Winston:

Q. Your name is Dexter Rains?

A. Yes, sir.

Q. Where do you live?

A. LaFollette, Tennessee.

Q. And for whom do you work?

A. Tenneo, Inc. That is a coal mining outfit at Lake City.

Q. Did you formerly work for the Benedict Coal Corporation?

A. Yes, sir.

Q. And what was your position with them.

A. I was shipping clerk and purchasing agent.

Q. We have a period involved here between March, 1950, and June, 1953. Were you connected with the Benedict Coal Corporation during that period of time?

A. Yes, sir.

Q. What was your position?

A. Shipping clerk, sir.

Q. We have a chart that has been introduced in evidence and I will use this chart so we can expedite our testimony. First coming to a date, I think it is covered, in April of 1950, that has two dates marked in red indicates a lay-off or strike. Do you remember that occasion, sir?

A. There were several lay-off strikes. There were several strikes before then. If I could—would that be the No. 7 men?

— 120a —

Testimony of Dexter Rains

Q. It was after the No. 7 men had been laid off and state whether or not there was a dispute there?

A. Yes.

Q. What happened at that time, that you remember?

A. No. 7 mine was shut down and the No. 7 men wanted to take the jobs at the No. 9 and the No. 11 mines.

The Court: Gentlemen, is there any dispute about these work stoppages, Mr. Kramer? Is there any dispute about the work stoppage on the date shown?

Mr. Kramer: No.

The Court: Mr. Winston, can we not shorten it by going into something else because Mr. Kramer says there is no dispute about that.

Mr. Winston: All right.

Mr. Kramer: There was a work stoppage on the date.

Mr. Winston: Is there any dispute about what caused this work stoppage?

Mr. Kramer: Yes.

405 By Mr. Winston:

Q. Before this work stoppage or at the time was there any disagreement between mine management and the men there, with the local, the union?

A. What was that?

Q. At the time of this work stoppage or strike in April, was there any dispute or disagreement between the mine management, between Mr. Darst, Benedict, and the members of the local there at Benedict?

A. There had been a dispute all the time.

Q. What was the dispute over, this placement of No. 7 men?

A. Well, the dispute was just as I said, that the No. 7 men were claiming seniority and wanted to be moved to No. 9 and the No. 11 openings to take those men's jobs up there. The whole thing surrounded around on hand loading of the cars and the other two mines were mechanical

Testimony of Dexter Rains

mines, and these men couldn't even fit if they wanted to or if it had been all right, because they were hand loaders.

Q. And how long did that dispute last, if you remember?

A. Well, I just couldn't say how long it lasted.

The Court: Mr. Winston, Mr. Kramer says there is no dispute about that. Let's don't go into those matters.

By Mr. Winston:

Q. Was there any work stoppage or strike during
406 the time of that dispute?

A. Yes, sir.

Q. Do you remember whether or not anybody from the District came down, District 28?

A. Yes.

Q. Who did?

A. Mr. Scroggs.

Q. Was the strike going on at the time he was down?

A. Yes, sir.

Q. What was Mr. Scroggs' position?

The Court: Is there any dispute about that?

Mr. Kramer: No. He was a field representative of the District, your Honor.

The Court: No dispute about that.

By Mr. Winston:

Q. What was his position?

A. You mean toward the strike?

Q. Yes, toward the dispute.

A. That the No. 7 men were to be placed in No. 9 and No. 14 mines.

Q. And what was your company's position about the strike?

A. Well, the company's position was that they wanted to use the men that were more familiar with the mechanical mine, and that we would offer to take it to the arbitration board or anything outside of there to settle it.
407

Testimony of Dexter Rains

Q. What was Mr. Seroggs' answer to that?

A. Well, he thought they couldn't settle it with taking it to the arbitration board. I mean, he didn't want to take it to the arbitration board, so we didn't take it to the arbitration board.

Q. Did he agree it be taken to the arbitration board?

A. No.

Q. How was that strike resolved?

A. Well, some of the men did move up there. Some of the older men, they had to send them to the other two mines.

Q. I mean, who won the dispute?

Mr. Kramer: I object to that, that is a conclusion.

The Court: Sustained. I don't think that is a question of who won, in the lawsuit. I don't think that is an issue in this case.

By Mr. Winston:

Q. We come to a strike called the water strike, September 27, 28 and 29, 1953.

Mr. Kramer: Before he takes that up, I made the statement there is no dispute between us but the mine did not operate during the days shown in red. I do not agree to that during this last one here in May, the latter part of this. Your Honor understands our position?

The Court: That is right. Your position is that
408 they were ready to work.

Mr. Kramer: That is correct. We admit they were not in operation.

The Court: That is right.

The Witness: The water strike?

By Mr. Winston:

Q. Yes.

A. Well, we had two or ~~three~~ of those. I mean, it was something that couldn't be helped as far as the company was concerned, but the men wanted the outside employees

Testimony of Dexter Rains

that did not live in the camp, they wanted them to quit bathing up there on the job so that the water would last, and the water was getting low and they would cut it off and on and turn it off and on, and the men came out on the strike to stop the men, to stop the outside men from bathing at those private homes.

The company did not have a bath house. We had no control over it whatever.

Q. Do you know a man by the name of Collingsworth?

A. Yes, sir.

Q. What was his position?

A. He was one of the foremen there at the No. 5 mine.

Q. Was there any disagreement between the company and the local or the union over Mr. Collingsworth?

The Court: Is there any dispute about that, Mr. Kramer?

Mr. Kramer: No. There was a stoppage over Collingsworth. There may be a dispute with the details.

The Court: No dispute about that.

Mr. Winston: There is no dispute the men wanted Collingsworth fired?

Mr. Kramer: Yes, there is a dispute on that.

The Court: You can go into that then.

By Mr. Winston:

Q. What was the attitude about Collingsworth? What did they tell the company about him?

A. I don't know just exactly their attitude, and everything later on that. They came up to the office one afternoon and said they wanted Collingsworth run off.

Q. Who was that that came up to the office?

A. I believe that it was—there was so many different committees that were there—Ray Hargraves was one of them, and Cecil Fortner, and one other or two along. The men had sent them up to call for a meeting about Jim Collingsworth.

Testimony of Dexter Rains

Of course, one of the men, I believe—I am not satisfied I am saying this right—Ray Hargraves wanted, or one of the committeemen said, he did not have anything to do with it but that was his job, to come up and get the meeting, they wanted the company to fire Jim Collingsworth.

He said he thought it was because he had asked the
410 men to put out and work.

Q. Did the company fire Jim Collingsworth?

A. No.

Q. After that, after the committee came up to see the company, was there any strike?

A. They were off a couple or three days on that. I think my recollection is right.

Q. Was that after they came up there to the company?

A. I don't believe that the night shift went in to work that night.

Q. Did that happen subsequent to when the committee come up and asked Collingsworth be fired?

A. That's right.

Q. After they asked the company to fire Collingsworth and the company refused, do you know how soon after that they struck?

Mr. Kramer: He has testified it was that same night.

A. They came out that night.

The Court: Gentlemen, let's get to the point of this lawsuit and leave out the details. Let's get to the point.

Mr. Winston: All right, sir.

By Mr. Winston:

Q. We have listed here and there has been testimony of a strike over vacation pay in July, 1951.

Were you present at any conference or meeting during that strike?

A. Yes, sir, there was.

Q. Was anybody down from the District?

A. Yes, sir. Let me think on that one, sir. I am not too

Testimony of Dexter Rains

certain whether Mr. Seroggs came down or whether we called him on the phone, but we were in contact with Mr. Seroggs about the vacation pay.

Q. What was his attitude about it?

A. Mr. Seroggs said that we owed them vacation pay, which we weren't saying we did not owe it. We knew we owed it for any one month or any five months or any year. We owed the vacation pay, but the reason for the strike was that we refused to pay vacation pay to the men who had quit our employment and owed us, owed the company. We held this vacation pay and applied it to their accounts.

Q. How was that strike handled?

A. Sir?

Q. How was that strike handled?

A. Well, they let us arbitrate that between each individual and the company. We set up there one evening, on Saturday evening, Mr. Charles Newman and myself were in there, we let each man that complained about his vacation pay come in and talk to us about it, and we tried to

get him to let us apply this amount of money to his
412 account that he owed the company, and if we could
out-talk him, why we took any part we could get
out of it, 30 percent, 25 percent, or all of it. There was not too many men involved in that. I mean, some of the men, they did not come up after that, that is the way the case was settled out.

Q. Now, sir, do you know Mr. M. M. Campbell?

A. Yes, sir, I do.

Q. Do you recall any difficulty that he or his men had with the union?

A. He was all the time having difficulty with them for some reason or other down there. I don't know what.

Q. Were you at any meetings at Mr. Darst's office at which time Mr. Campbell was there and Mr. Seroggs?

A. No, sir, I was not present at that meeting. I knew

Testimony of Dexter Rains

about the meeting and the afternoon—I was present at one meeting. Now, I don't remember whether Mr. Scroggs was there or not. I was present at one meeting with a committee and Campbell, but I don't think Mr. Scroggs was there the afternoon when I was there.

Q. Did you see Mr. Scroggs at any time during that trouble with Campbell?

A. I talked to Mr. Scroggs; yes, sir.

Q. During that period of that dispute?

A. Yes.

Q. What was Mr. Scroggs' position?

413 A. Well, Mr. Scroggs' position on that—that was during the time of all these cut-offs at the other mine when we were having to cut down one mine right after another was going down, and Mr. Scroggs' position on that was Campbell would have to use the men that was on the Benedict panel, or the men that were cut off at Benedict.

Mr. Campbell was a contractor putting in a slate disposal plant there and that they would have to use those men there.

Q. And who said that?

A. Mr. Scroggs.

Q. And were there any strikes after that time, after you heard him making that position, taking that position?

A. Yes, sir. There were two or three different occasions they were down.

Q. Do you also recall a dispute over credit?

A. Yes, sir.

Q. Do you recall whether any District representative was down at that time?

A. Well, I don't—we had that thing going on there for three or four different times. Every time we would have a shutdown we would have one of these credit arguments.

Testimony of Dexter Rains

Q. What was the dispute between the company and the union over credit?

414 A. Well, the dispute was this. Whenever they have started shutting the mine down, before we could get all the men placed up at other jobs that we were going to use, we would extend credit to our men that just was right up against it. We would go ahead and give them two and three dollars a day without knowing whether they were going to be placed up at the other mine or not. We just did not know.

We did not know who to cut off or who not to cut off, and from the scrip issuance or credit issuance so they could trade at the store, so after we got that worked out we couldn't extend credit to the men any longer. We didn't know whether they were going to be with us or not so we just had to stop it, it was costing us too much money—taking too much out of the pot and we just didn't have that kind of credit ourselves.

Q. What was the position of the local about that?

A. Well, the local, the committee came up and wanted us to keep extending these men credit, and so they had, oh, maybe a four or five day strike that they come out and would not work because the men that was not working did not have any credit, and the committee and the board members tried to get us to go ahead and let the men have the credit issuance to them so that they would tide themselves over from one day to the next.

Mr. Kramer: Your Honor, I object to that unless an identification is made. The witness used "board
415 member"; which is a new word in this record.

The Court: Yes, you will have to specify.

By Mr. Winston:

Q. Which particular ones, if you remember?

A. What is that? Give me that again.

Q. The board member.

Testimony of Dexter Rains

A. The committee, committee members.

Q. Coming to November, 1952, on the list here as the Tabor strike. What was the dispute at that time between the company and the union?

A. Mr. Tabor was an irregular worker, and, well, it was practically every Monday morning Tabor was not at work. They changed him from one shift to the other; gave Tabor all kinds of chances until they cut Tabor off and the men backed him up in a strike. An irregular man.

Mr. Kramer: No dispute on that, that Tabor was laid off for irregular hours.

The Court: All right.

By Mr. Winston:

Q. Was any field representative down at that time?

A. I don't recall whether he was or not.

Q. Now, do you recall a strike that happened after two men ran a locomotive in the creek?

A. I do.

The Court: Any dispute about that?

416 Mr. Kramer: A lay-off because a motor went down in the creek.

The Court: No dispute about that.

By Mr. Winston:

Q. Was there a dispute between the company and the union?

A. Yes.

Q. What was the dispute?

A. Because we had, the company had fired the two men involved in the accident.

Q. Did the company want to arbitrate that matter?

A. Yes, sir.

Q. Was any union field representative down at that time?

A. Yes, sir.

Q. Who?

Testimony of Dexter Rains

A. If I am not mistaken on that, that was Mr. Clark.

Q. Did he agree to arbitrate it?

A. No.

Q. What was his position?

A. Put the men back to work.

Q. Now, sir, did you know Mr. Ura Swisher?

A. Yes, sir, I did.

Q. Under what trade name did he operate?

A. Big Mountain Coal Company.

417 Q. When did he come up on the Benedict property?

A. He started working there on the property around March of 1953, sir.

Q. What type operator was he?

A. Mr. Swisher was a strip operator, and a coal recovery auger operator.

Q. What type of employees did he have; what type equipment did they handle?

A. Well, power shovels, bulldozers, coal recovery augers and high wall drills, large haulage trucks.

Q. What relation did his company have to Benedict's type work?

A. Sir?

Q. I will ask you whether or not he was a lessee of Benedict, became a lessee of Benedict?

A. Yes, sir.

Q. When he started out did he have a contract with the United Mine Workers—that is, Mr. Swisher's company?

A. No.

Q. Do you recall whether or not there was any dispute between the union and Mr. Swisher over that?

A. Yes, sir, there was.

Q. What was the dispute?

A. Well, they wanted his men organized and put in the Benedict local.

418 Do you want me to go ahead and tell you what I know about it—

Testimony of Dexter Rains

Q. Yes, sir.

A. Well, I mean, whenever he first moved in there during March there was not any commotion or any trouble or anything like that, and he brought his equipment in and put it on the mountain and then some of the men were troubled about the thing because they thought that this type of mining would displace their jobs and they started kind of grumbling around about it, and when he started mining coal they started complaining to the company, to the Benedict people, that it was not union coal and they wanted him in the union.

So one morning they called me at my home and told me they weren't working that day. Mr. Fortner I believe was the man that called me, or Mr. Sargent at the tipple, who was tipple foreman. They were my two connections on finding out what I would have to get for my setup for the day's work and they always called me before I got to work when there was trouble, and said there was some men—

Mr. Kramer: Of course, we would object. Mr. Fortner is a company foreman. We have no objection to his stating that he brought him some word.

The Court: That is not competent as substantive evidence, gentlemen.

419 By Mr. Winston:

Q. I will ask you at the time of this dispute if you had occasion to go with Mr. Swisher and Mr. Darst up to the office of Mr. Allen Condra?

A. I did.

Q. Do you recall about what time of the month that was?

A: No, sir, I don't. I don't remember the date on that. That was some time, might have been a month or two after Mr. Swisher was there. About May, I would suppose.

But we went to Mr. Condra's office at noon time. I was

Testimony of Dexter Rains

working for Mr. Swisher as a bookkeeper and they had been down two or three times, the union officials had, on getting this Big Mountain Coal Company organized.

Of course, Mr. Swisher being the owner he would be the only one to do that, and we went to Norton and told Mr. Condra that—I called Mr. Condra for a meeting and got an appointment and got Mr. Swisher in here and we went to Norton, and in Mr. Allen Condra's office why we told him that we were there to sign the contract.

Q. What happened at the office, sir; what did Mr. Condra say about Mr. Swisher signing that contract?

A. Well, the whole thing, we wanted to work out an agreement on signing the contract whereby that we would go ahead and pay the welfare and set up the standard wages. They did not have any set wages for the strip mine operation in our district at that time. It was not because this was a new type of mining but this district did not have this type, and we worked on that and called the Clinchfield people to find out the basic wage rate.

Of course, it was fortunate we were paying, the Swisher Coal Company, Mr. Swisher was paying his men more than the contract called for so we did not cut the wages on that.

And we tried to get the thing set up where we could pay the welfare and be under the union if we could have—the company wanted the men to be in their own local charter, not have any dealings with any of the rest of them. And the only other stipulation that they asked was that they give us time until the lawyers could decide the name of the company.

It was incorporated in Virginia so they did not have a name down here for them, and Mr. Condra wanted to sign a blank contract which Mr. Swisher refused to do.

And so Mr. Condra told him if he did not sign it that

Testimony of Dexter Rains

he was afraid he would have trouble with the Benedict men.

Q. Did Mr. Condra make any statement about any trouble Benedict would have if that contract was not signed?

A. He said the Benedict men would come out—no, he did not say it that way either.

Mr. Condra said that we would have trouble out of the Benedict men which he was afraid in turn would cause Benedict some trouble.

It was all in the same thing. But Mr. Swisher told him if he couldn't trust him he wouldn't sign the contract and he wouldn't trust him either, and so we left.

Q. Now, sir, at that meeting did Mr. Condra make any statement if he did not sign the contract what he would do?

A. Ask me that question again.

Q. Did Mr. Condra make any further statement about his efforts to try to get the contract signed?

A. He would see the contract was signed, he was going to see to that.

Q. Did he state that?

A. Yes, sir, that they would see the contract was signed, that we would not work.

Q. Do you know whether after you left that meeting Mr. Swisher did sign a contract?

A. Yes, sir, Mr. Swisher signed later. We signed a contract; yes, sir.

Q. Did any strike follow that disagreement?

A. Yes, sir. We were down—I don't know how long we were down, but we were on a strike.

Q. Do you recall what the issue was when you were down with the local?

A. It was because the Big Mountain Coal Company did not have a contract with the union.

Q. Was there any issue about whether or not the

Testimony of Dexter Rains

contract would be that Big Mountain employees would belong to the Benedict local?

A. Yes, sir, that's right.

Q. That was the issue?

A. That's right. They wanted to put them in the Benedict local.

Q. And I will ask you whether or not it was not true Mr. Swisher was agreeable to the contract?

Mr. Kramer: I object to the leading.

The Court: Sustained.

By Mr. Winston:

Q. Was Mr. Swisher agreeable if he could have his own local?

A. That's right, sir.

Q. During that period in question, April, 1950, through May, when those disputes did come up, what was the company's position about arbitrating?

A. Well, if the disputes that we had were any disputes at all, why we would be willing to take our chances at the arbitration board with them.

Q. Did the company request arbitration?

A. Yes, sir. Several occasions we requested that we be allowed to take it to the arbitration board.

423 Q. Did the company agree to take the contract to the arbitration board during that period?

A. Yes.

Q. Did the union agree?

A. No, sir.

Q. Prior to 1950 had the company been able to take disputes to the arbitration board?

A. Prior to 1950—I only began working there in, I believe it was '49. I don't know about their problems before that.

Q. But during this period you do know about?

A. Yes, sir.

Mr. Winston: You may ask him.

Testimony of Dexter Rains

Cross-Examination, by Mr. Kramer.

Q. You are working, you say, for the Tennco Corporation, LaFollette?

A. Yes, sir.

Q. That is Mr. Swisher's company?

A. That's right.

Q. He is operating over at LaFollette now and working at the same kind of work you did when he was up there?

A. It is Lake City.

Q. It is a strip operation?

A. Yes, sir.

424 Q. Mr. Swisher's operation?

A. Yes.

Q. Aren't you mistaken about any of these matters going to arbitration during this period of 1950, 1953?

A. I don't think I am.

Q. Let me call your attention to the time Mr. Anders and Mr. Roark were discharged and there was a work stoppage and which was, according to this record, on the dates of August 5 and 6, 1952. That was settled, the men went back to work and the question was whether or not they would receive pay for the days they had been off under discharge, and that was agreed at the time to arbitration, wasn't it, to determine it, didn't it?

A. I believe you are right, sir.

Q. So there was arbitration during this period of time. But after that, even that had been referred to arbitration, they finally decided they would withdraw it and make some other sort of deal or arrangement. The issues were submitted to the board but before any action by the board the company withdrew it, but you do recall it was referred to arbitration originally?

A. I believe that is right.

Q. And then when you had these various meetings, some

Testimony of Dexter Rains

of which you say Mr. Scroggs was in, one in which you say Mr. Clark was in, they were arguing from the men's standpoint, that the men were generally in the right, weren't they?

A. Yes, sir.

Q. And the company was arguing they were in the wrong, that the men were in the wrong?

A. We were arguing contract to them. We took the contract, if we were violating the contract, nine times out of ten we did not have any argument with them at all over it.

Q. Let's talk about the water. What was in the contract about the water you talked about?

A. No stipulation whatsoever.

Q. Wasn't arguing about contract on the water, were you?

A. No.

Q. The water had gotten to the place that there was not only no water for the men outside to bathe but there wasn't even water for the families in camp.

A. That's right.

Q. But as soon as the men decided to quit work, and was not in any way covered by the contract, when the men did quit work the company got busy and got pipe and put water in there right away, didn't you?

A. No.

Q. Got pipe the next day or second day after that, didn't they?

A. The company tried to get some water in from another mine through plastic pipe. We did make an effort to get water there.

Q. And as soon as you agreed to make an effort there the men went back to work. They were off two days, were they?

A. Yes, sir.

Testimony of Dexter Rains

Q. And as soon as your people made an effort to get water in there—didn't even ask you to get it in, wholly out of the contract—and you people agreed to get it in, the people went back to work?

A. I don't know whether they said just because we were going to try to get it in there they would go back to work, but we made an effort to conserve the water in the dry summer time. There is no wells there. It was from an old, abandoned mine and when the water did drain out of there we did not have any water, there was no way to supply it.

Q. There was some water somewhere over the hill that they were told they could carry it from.

A. I don't know anything about that.

Q. You don't know anything about that statement made to the men?

A. No, sir.

Q. Where did you get the water when you put the new plastic pipe in?

A. They tried to get some water from another—I believe that they were trying to siphon it in there
427 from the back side of the mountain, No. 9 opening, somewhere or other.

Q. I will come to this vacation pay, the question of the vacation pay.

You knew, or were you familiar with the language of the contract with reference to vacation pay?

A. Well, I am pretty familiar with it; yes, sir.

Q. And you know that there was a ruling made by the International Union and accepted by the operators who were subject to the contract, that regardless of any amount the men owed the company, the employer, the vacation pay was to be paid in cash, and you knew the other operators under these contracts had accepted that ruling by the International, didn't you?

Testimony of Dexter Rains

A. No, sir, I did not. I will correct your statement and I will ask you, if I understand you right, you said that I knew that it referred to the employees of the company.

I do know it covers other employees, but I don't know that it refers to men that had been cut off or did not have a job with the company.

Q. But you did know it said that the vacation pay was \$100.00 a year, for a year's work.

A. That's right.

Q. The period was the 12 months preceding the vacation period, or pay period, and which ended on the last pay day in June of each year.

428 A. That's right.

Q. So that if a man had worked continuously, and I mean continuously during the period the mine was open and operating, he was entitled to \$100.00?

A. Yes.

Q. For five months of that year he was entitled to five-twelfths of that \$100.00?

A. Yes.

Q. So that even these men laid off would have some money coming—anyone that had been laid off for lack of work, been off two months, they would be entitled to ten-twelfths of the \$100.00.

A. That's right.

Q. You knew whatever that amount was, whether a full twelve months or \$100.00, or whether it was ten-twelfths, it was the ruling of the International that these men were to be paid in cash for the period that they had worked, either ten-twelfths or the full \$100.00, regardless of the amount of money they might owe to the company for their store debts—

A. The contract didn't state regardless of what they might owe the company before.

Q. That is true. I am not asking that.

Testimony of Dexter Rains

A. I say, the contract don't state any such language.

Q. The language is not in there. I will ask you if a dispute had not arisen, at a meeting of the representatives of the operators and the International Union, probably Mr. Lewis and Mr. Moses, between the top bracket of the operators and the union, and the contract says it was agreed, and this procedure was being followed generally by the operators, that regardless of what the amount of money a man owed the store, he was due to be paid in full for vacation pay?

A. That is right.

Q. But you people did not pay in full for that vacation pay if the man was off the job because of this change the company was trying to do. Rather than follow that procedure the company tried to offset against the vacation pay the store debt or so much as could be offset, and apply it only to the men who were not then working?

A. Not only to the men that did not have a job with the company and were not employees of the company, you are right, but store credit is not any different from cash. If we observe closely—

Q. We won't argue about that. There were 25 or 30 of these people only involved, as I recall it; the number was not large.

A. That is right. There wasn't too many of them.

Q. And you were working about 300 men at that time, weren't you?

A. I guess we might—

Q. Approximately.

430 A. Approximately, yes.

Q. Now after this work stoppage because of what these men said was a violation of the contract as interpreted, not just exactly as written but interpreted, the men quit work. Then you talked to Mr. Scroggs or Mr. Scroggs was at the mine.

Testimony of Dexter Rains

A. Yes, sir.

Q. Mr. Scroggs took the position under the arrangement the men were entitled to this in cash regardless of the store debt?

A. That's right.

Q. You took the position that was not correct.

A. That is right.

Q. You negotiated back and forth, and finally the people on the committee—was Mr. Scroggs in on that meeting?

A. No, Mr. Scroggs was not in on that.

Q. The committee of the local and you people negotiated out a plan under which it was agreed that each man should be treated individually.

A. That is right.

Q. That had not been offered to them before the work stoppage?

A. Sir?

Q. That had not been offered to them before the work stoppage. The men had not been called in individually and talked to before the work stoppage?

431 A. No, sir.

Q. But after this work stoppage you did call them in and talk to them individually?

A. Yes.

Q. And if the man was willing to let part of his vacation pay be credited on the store account you agreed to it and paid the balance in cash.

A. The reason that come about, there were three or four men that were—there wasn't but a handful of them doing the harping about it. They were wanting their money, four or five different employees, and they were the cause of the whole trouble, and on them we got an agreement, but we did deal with each individually.

Q. You and the local committee, you made that agreement?

Testimony of Dexter Rains

A. Yes.

Q. You would call them in one by one?

A. We did not call them. We gave them the privilege to come and claim it.

Q. Those who came in and asked for it in full were given it, and others who asked for half of it were given half of it; if they said they wanted part of it you paid them that, and some of them did not come at all and did not claim it and you took full credit on the store account.

A. That is right.

Q. But that offer had not been made before the work
432 stoppage or strike?

A. No, sir.

Q. In this Big Mountain mine you and Mr. Swisher went up, you say, to the District office in Norton?

A. That's right.

Q. And the question was discussed about signing a contract.

A. That's right.

Q. You did not have figures at that time to agree on rates of pay and so forth?

A. No, sir. The District did not know what the rates were.

Q. You did not have any figures at that time or rates of pay for strip operations?

A. That's right.

Q. And what Mr. Condra wanted them to do was to sign one, just a blank piece of paper but the regular printed form used by the union but the rate of pay left open to be ascertained?

A. The rate of pay would not be in the contract there; no.

Q. But with the understanding the rate of pay should be left open until that could be determined.

A. He just asked to sign the contract. The rate of pay was not into it at all.

Testimony of Dexter Rains

433 Q. Why was not the contract signed that day?

A. Because that Mr. Swisher, his men, had asked that they have a separate local, that they not be thrown in with the Benedict local; that he be given time until the lawyers for his company could establish a name and everything, to be put on there so that he could sign it then.

Q. He did not know the corporate name you were going to operate under?

A. That is right.

Q. That is what was going to be left blank in the contract, would have been, because you had no corporate name.

A. He had nobody to sign, that's right.

Q. One other thing in connection with that. Mr. Condra told you people, did he not, that the District had no right to authorize the creation of a new local; that was a matter that had to be handled by the International. He told you that, didn't he?

A. Mr. Condra said that—he did not try to explain it that way. He just said you will be put in the local that we want you in. We will be under the local they wanted. That is to be left up to the union.

Q. Did he say the union or International Union?

A. He said that is to be left up—whenever he says union, that is International, that is from top to bottom.

Q. What I am trying to get is what he said. Did
434 he say it was to be left up to the local, District, International Union?

A. He said it will be left up to them, and speaks of them as the union.

Q. You don't know whether International or local or District?

A. No, sir, I don't.

Q. Later on a contract you say was signed by Mr. Swisher?

A. That's right.

Testimony of Dexter Rains

Q. Do you all the date of the Swisher contract?

A. No, sir, I don't. I don't recall that. I think it was some time in May that we went up there.

Q. 1953?

A. Yes, sir, it was 1953.

Q. One more question about that. When you were up there talking about this agreement, Mr. Scroggs, Mr. Condra, or was it Mr. Scroggs that made the statement "If you don't sign the agreement today I will have trouble with the Benedict men?"

A. No, Mr. Scroggs wasn't there present.

Q. Mr. Condra?

A. Mr. Condra.

Q. Mr. Condra.

A. Mr. Condra told Mr. Swisher that he was afraid
435 he would have trouble out of the Benedict men.

Q. That is he, Condra, was afraid he would have trouble out of the Benedict men?

A. He was talking to Mr. Swisher. He meant he was afraid Mr. Swisher would have trouble out of the Benedict men.

Q. The language he actually used was "I am afraid I will have trouble out of the Benedict men," wasn't it?

A. Mr. Condra said, "I am afraid that you will have trouble out of the Benedict men."

Q. "You will" or "We will" or "I will?"

A. That "You will."

Q. Are you sure he used the word "you?"

A. Yes, sir. I was present.

Q. You are certain of that?

A. Yes, sir. Probably have trouble, I am sure—

Q. You cannot fix the date of that meeting. If you can at all I would like you to.

A. I should have gotten that down. I don't know, sir. I am thinking that is in May.

Testimony of Dexter Rains

Q. You think that Swisher actually signed the contract in May. How much time do you think is between the two?

A. Well, we paid our men while that dispute was going on. I don't know. It must have been—we paid their wage and room rent and board, I think, while those men were out.

436 Q. That must have been a week and a half or two weeks, something like that, for us getting that thing settled. I don't remember.

Q. You think your men were out a week and a half?

A. Yes, sir, I think so.

Q. Did your men go back to work before the men went back at Benedict—at this May stoppage I am talking about, 1953.

A. No, sir.

Q. You think they all went back at the same time?

A. I believe that the Benedict men were back in the mine first, sir. I think that I am right on that. I think the Benedict men, I believe they went to work first.

Mr. Kramer: That is all.

Redirect Examination, by Mr. Winston.

Q. Mr. Rains, Mr. Kramer asked you about some arbitration about Anders and Roark. The fact is that was not until after the strike was over and the company put Anders and Roark back to work.

A. That's right.

Q. And Anders and Roark went before the board and tried to get two days pay.

A. That's right. They wanted for us to pay them for the two days.

437 Q. Mr. Kramer also asked you about the strike over the vacation pay. Did I understand from you that the men involved with the vacation pay were no longer employees or were no longer working for the company?

Testimony of Ura Swisher

the employees of the Big Mountain Coal Company desire a charter of their own. Certainly 40 or more men are a sufficient number for a separate local, and that will be the approximate number when all equipment and all shifts for full operation is reached.

“Meanwhile, we are operating under the Contract, with the payment of dues by the men, payment of the
443 Welfare Fund and payment of the contract rates or more to the men. The above will confirm request made in your office for the separate local union, and we await your advice on this matter. We prefer to deal with you direct in this matter rather than with any intermediate representatives, including the Benedict Local Union Committee, who as we see it has no business interfering with our operations on or off the job since they are concerned with deep mining.

“Thank you for your courtesy in this matter.

“Yours very truly,

s/ Ura Swisher,

“President,

“Big Mountain Coal Company.”

The Court: How do you spell that Swisher?

Mr. Winston: S-w-i-s-h-e-r, U-r-a.

We would like to file this as Exhibit No. 20.

(Exhibit No. 20 was filed.)

Mr. Winston: We will file this carbon copy of the lease as Exhibit No. 21.

(Exhibit No. 21 was filed.)

By Mr. Winston:

Q. Mr. Swisher, I also hand you a copy of a letter dated May 14, 1953, and ask you if you sent such a letter to Mr. Condra.

A. Yes, sir, that is my signature.

Testimony of Ura Swisher

444 Mr. Winston:

“Big Mountain Coal Company
Incorporated
St. Charles, Virginia

May 14, 1953

“Mr. Allen Condra, President
District 28, U. M. W. of A.
Norton, Virginia

“Dear Mr. Condra:

“I got busy with representative of the Texaco Company changing away from Standard Oil, and missed Mr. Harris this afternoon, as I did not quite realize he was in the office waiting.

“I have today signed three copies of the Contract on condition that the employees of the Big Mountain Coal Company be granted a separate Local Union Charter in the UMW of A. These men have requested this through me and have so voted, therefore the matter is more or less out of my hands.

“We were in no way holding back on anything except the clearance by the State of Virginia for the use of the name chosen for the new company, and only today did we get word that use of the name was OK in Virginia. We enclose the above three Contract copies for your action and as evidence of our good intentions.

“Yours very truly,

/s/ Ura Swisher,

“President,

“Big Mountain Coal Company,
Inc.”

445 I want to file this as Exhibit No. 22.
(Exhibit No. 22 was filed.),

Proceedings

A. That is right.

Mr. Winston: That is all.

Recross-Examination, by Mr. Kramer.

Q. I will ask you if a part of the settlement of this Roark and Anders matter it was not agreed at that time that the question of back pay—you agreed to put them back to work and the question of back pay was discussed in that negotiation and at that time it was agreed it would be left to the board for arbitration as a part of the settlement; isn't that true? You don't know?

A. No. I was trying to think that thing out because I had forgotten all about those two days that was involved there.

Those two men came up and asked for pay on those two days after the men had gone back to work. Jap Anders, Mel Roark, and they did come to me in particular on that occasion and they did ask for pay, but I didn't remember about the arbitration or anything, and—

Q. Well, if you are not certain just say so.

A. I am just not certain.

438 Mr. Kramer: All right, that is satisfactory. You may go.

(Witness excused.)

(At this point a discussion was had between counsel and the Court concerning the number of witnesses remaining.)

The Court: Adjourn Court until 1:30.

(At 12:10 p. m. Court recessed for the noon hour until 1:30 p. m.)

Afternoon Session.

(Court reconvened at 1:32 p. m. and the following proceedings were had in the presence of the jury, to-wit:)

The Court: Proceed, gentlemen.

Testimony of Ura Swisher

URA SWISHER,

called as a witness by and on behalf of the defendant-cross plaintiff, after having been first duly sworn, was examined and testified as follows:

Mr. Winston: This witness is Mr. Ura Swisher. I consulted with Mr. Kramer and counsel stipulate the following facts:

The Court: These facts which counsel is about to read to you, lady and gentlemen of the jury, are agreed
439 to and you take as facts because they are agreed to by both parties, and this witness will not testify, or any other witness will not testify, about these facts because they are agreed to by all parties.

Mr. Winston: Mr. Swisher is a strip miner and during the time that he was up on the Benedict property he worked under the trade name as Big Mountain Coal Company. He went on the Benedict property in late March, 1953, and started producing coal the last part of April, 1953. He operated under a lease from the Benedict Coal Corporation.

Mr. Kramer: We understand you are going to file that?

Mr. Winston: Yes. It was filed by Benedict, but I don't think we signed it. We have a copy here, sir.

When he started producing coal the union wanted him to sign a union contract. He, in the company of some others, went to Mr. Allen Condra, the District 28 president's office, the first part of May, 1953.

Direct Examination, by Mr. Winston.

Q. Now, sir, when you came to work on that Benedict property where did you get your employees?

A. My employees were brought with me from Ohio.

Q. When the union wanted you to sign a contract
440 were you willing, sir?

Testimony of Ura Swisher

A. I was.

Q. What was the attitude of your men?

A. Well, they, the men, were wanting a local of their own.

Q. Were they willing to join the union if they could get a local of their own?

A. They were.

Q. Now, sir, you went to Mr. Condra's office, I believe with Mr. Darst and Mr. Rains, the first part of May, 1953. Tell the Court and jury what conversation you had with Mr. Condra and what Mr. Condra told you.

A. Well, we were ready to start producing coal, and we had produced a little, and we were requested to join the union. The men had heard a right smart of the experiences of the union in Benedict's mine, that how the operations were, and they did not want to be somebody that come to work one morning and have to go back home, and they wanted to work every day, and they asked me to represent them and get a local of their own.

Q. What did Mr. Condra say about that?

A. Mr. Rains and Mr. Darst and myself drove up to Mr. Condra's office and laid the card on the table to him, and he said we had to join the Benedict local, that he did not want two locals in the same mine, and we refused
441 on the contract and he still insisted we had to join the local and he had the control of that.

Q. Did Mr. Condra make any statement as to what would happen if you did not sign according to his terms?

A. He said if we didn't sign up with him, with the Benedict local, we would have trouble with the Benedict local, the union, and everybody else in the Benedict mine would be down, and he said he had control of it. He requested me to sign the local.

Q. Did he state what would happen in the Benedict local if you did not sign?

Testimony of Ura Swisher

A. He said there would be a strike until it was settled. He said we wouldn't be working, that was Mr. Condra's own mouth.

Q. Did you sign a contract that day on Mr. Condra's terms?

A. No, sir.

Q. Did you later write Mr. Condra a letter, dated May 13th, 1953? I hand you a copy.

A. Yes, sir, that is my signature.

Q. That is your signature?

A. Yes, sir.

Q. I believe it appears to be a carbon?

A. That's right.

Mr. Winston: I would like to read that to the jury,
442 please, sir, and the Court.

“Big Mountain Coal Company
Incorporated
St. Charles, Virginia

May 13, 1953

“Mr. Allen P. Condra, President
District 26, U. M. W of A.
Norton, Virginia

“Dear Mr. Condra:

“The above name is the name we desire the new company to be called, whether or not it is incorporated in Virginia, Kentucky or Tennessee. We have heard from the Tennessee Industrial Commission that the use of ‘Big Mountain Coal Company’ is authorized, but we prefer to incorporate in Virginia.

“I am now ready to sign the contract with the U. M. W. of A. for the Big Mountain Coal Company, provided, of course, that the employees are granted a separate local union charter from the men of Benedict Coal Corporation. The reasons for this are obvious and particularly so since

Testimony of Ura Swisher

By Mr. Winston:

Q. Now, sir, I hand you a copy of a contract apparently signed by the Big Mountain Coal Company, by you and by Mr. John L. Lewis, Allen Condra and E. L. Scroggs, and I ask you, if that contract was executed by your company?

A. It was, sir.

Q. The contract, the date of it apparently was the 14th and over it—is that a “2”—is that May 14 and over that is a “2,” 1953? Do you know the reason for that?

A. Yes, sir. We run some coal in the early part of May and they back-dated it back to take care of this coal.

Q. That is, to the first part of May?

A. Yes.

Q. That is, it was to be effective as of that date?

A. When we run our first coal; yes, sir.

Mr. Winston: We file this contract as Exhibit No. 23.

(Exhibit No. 23 was filed.)

By Mr. Winston:

Q. After you signed that contract and sent it to Mr. Condra, was there any trouble between the Benedict men and your men, or your operation?

A. We had a pretty good siege of a strike.

446 Q. Where was the strike?

A. To the Benedict property.

Q. What happened when they had that strike on the Benedict property?

A. Well, several members of the local of the Benedict mine refused to let us go on the mountain, and asked us not to go.

Q. How did they do that?

A. They were forming a picket line on the road.

Q. Did your men go up the mountain?

A. Well, no, they did not pass the picket line.

Q. Were the Benedict mines operating at that time?

Testimony of Ura Swisher

A. No.

Q. What had happened to the Benedict mine?

A. They were on strike.

Q. Do you know any reason why they were striking at the Benedict mine?

A. Well, yes. The idea of the strike was to us on there without a contract is the way I understand it.

Q. Do what about the contract?

A. They were up there with the idea, the way I understand the strike, was they were refusing us to go up the hill because we were in a local and they wanted us to be in their local. We had signed a contract, but yet they wanted us to be in their local.

447 Q. Do you know the reason they were striking at Benedict?

A. No, I don't know what their troubles were.

Q. Were your men able to go to work?

A. No, they refused to let them. My men refused to go through their picket line..

Q. How long did that continue?

A. There has been a right smart time passed over and I couldn't be exact to say the number of days, but it was over a week we loafed around there.

Q. Did you have to take any steps in Court to be able to start operating?

A. Yes, we did.

Q. What did you do?

A. I went and got an injunction against their local, their union.

Mr. Winston: We offer in evidence a certified copy of the injunction order. The Acting Judge has certified as to the Clerk, and I think the Clerk has certified as to the Judge. It is an injunction order dated May 27, 1953. We offer this in evidence as Exhibit No. 24.

(Exhibit No. 24 was filed.)

Testimony of Ura Swisher

Mr. Winston: I would like to read this to the Court and jury.

448 Mr. Kramer: We object to the reading.

The Court: I do not see any purpose in that. Why?

Mr. Winston: To show the date, sir.

Mr. Kramer: He has already testified the date.

Mr. Winston: It is stipulated the order was obtained on the 27th?

Mr. Kramer: The witness so stated, and I did not object.

Mr. Winston: I did not recall he had the exact date.

Mr. Kramer: If you say it was the 27th, it was the 27th.

Mr. Winston: That is what the order shows.

The Court: I think that is sufficient.

By Mr. Winston:

Q. After this injunction order was obtained, did your men go back to work?

A. Sir?

Q. After this injunction did your men go back to work?

A. We went back to work, I am sure, the next day.

Q. Now, sir, the coal you produced, through whose tipple was it sent or processed?

A. It went through the Benedict tipple.

Q. It went through the Bepedict tipple?

A. Yes, sir.

449 Mr. Winston: You may ask him.

Cross-Examination, by Mr. Kramer.

Q. Did you have a written contract under which you were conducting this operation other than this lease?

A. We had a gentlemen's agreement to start out and there is a copy of the lease.

Q. The thing I was driving at, was there any other agreement, written agreement, between you and them on how this tipple was to be operated, about how the coal was to be taken to the tipple, anything of that sort?

— 1014 —

Testimony of Ura Swisher

A. Just stated in the lease.

Q. So as I understand it there was no other agreement?

A. Nothing but a gentlemen's agreement.

Q. I do not know what you mean by a gentlemen's agreement.

A. Before this was written.

Q. This replaced any other verbal agreement you had and no other agreement subsequent to this?

A. Verbal agreement, and the verbal is the same as the lease.

Q. This is in no place dated. The date shows the blank day of blank, 1954.

A. That is a copy.

Q. Can you tell us the date, and even the signatures
450 and acknowledgment are all blank as to dates.

A. It is a copy—

Mr. Winston: May it please the Court, I explained to Mr. Kramer—

Mr. Kramer: What I am trying to do is get the date.

The Court: Do you know the date? Give him the date.
By Mr. Kramer:

Q. Well, let me ask you, you said you started mining coal about the first of May, I believe. Had this been signed before you started mining coal?

A. Well, we went under a gentlemen's agreement because we wanted to name the mine—

Q. That was about the first of April, according to the stipulation.

A. Yes, sir, and it was 30 days or so after before we named the mine and signed the lease.

Mr. Winston: I understand there may a copy that has the date on it that is in Knoxville. We will attempt to get it.

Mr. Kramer: As far as I am concerned it is proven sufficiently.

Testimony of Ura Swisher

The Witness: I have a copy of it at home.

Mr. Kramer: I raise no further question.

Mr. Winston: All right, sir.

451 By Mr. Kramer:

Q. I want to come back to this in a minute but to save time on this thing, you went up to Norton and met up there with Mr. Condra, you and somebody else?

A. That's right.

Q. About the first of May?

A. That's right.

Q. And 1953, and at that time you said you would sign a contract but you did not sign any because you had not any name for the company.

A. No. We did not exactly have a name of the company but he wanted us to sign a contract in the name of the Benedict local, and he said he had control and "You go under that local."

Q. Two things that kept you from signing: One, you could not sign because of the name of course, and his insistence it be a part of the Benedict local?

A. Yes, sir.

Q. Those were the two things.

A. We had the name but we did not have it officially.

Q. It had not been approved by the State people. For those two reasons there was not any signed, but did he later mail you the contract or did you take it with you?

A. Mailed it or brought it to the office. We did not take it with us. I was not there at the mine all the
452 time, you see.

Q. Anyway, you got it and later you signed it and sent it back with the letter, which letter is dated, according to the record, May 13th—the two letters, one May 13th and one May 14th.

A. As far as the dates I wouldn't say yes or not, but it is there.

Testimony of Ura Swisher

Q. The May 13th said you were now ready to sign the contract and the May 14th said, "I have signed three copies of the contract on condition that the employees of the Big Mountain Coal Company be granted a separate local union."

A. That is right.

Q. And was that sent back to you?

A. It was sent to the mine, headquarters of the mine.

Q. Sent back to the headquarters of the mine.

A. Sent back or brought back. When I came back it was there for me, and I don't know how it got there.

Q. It was back-dated to cover the period from the time of your first operation about the first of May?

A. Yes.

Q. You later on got a separate union up there?

A. Yes, after I got that injunction we got a separate union.

Q. Of course, the injunction had nothing to do with the separate union, but there were negotiations carried
453 on later and you got a separate union.

A. That's right.

Q. And when these men came there—how did the road go into the mine—how did the road go into your mine and the Benedict mines?

A. Well, the road goes through to the mine, up past the tippie and the Benedict mine, up past the store house and on up the road, and just about the store house is where they had us blocked.

Q. What they were really doing is blocking the entrance into the Benedict mine?

A. They passed the Benedict mine.

Q. Did you ever see the picket line there yourself?

A. Yes, sir.

Q. You say it was on beyond the Benedict mine?

A. Right where the mines all join, out there above the office. They were asking us not to go up the mountain.

Testimony of Ura Swisher

Q. Who talked to you about it?

A. Well, sir, I can't remember those men. I could point them out if I could see their face.

Q. It wasn't Mr. Condra?

A. No, the men were Benedict men.

Q. The mine men themselves, not the District men?

A. They might have had a field worker in the crowd.

Q. Was there a field worker in the crowd there?

454 A. The men were all strange to me.

Q. So you don't know whether any field worker or not?

A. I wouldn't say there was. I thought there was a field worker at the time but I wouldn't say.

Q. You wouldn't say there was a field worker there at that time?

A. No, I wouldn't say, sir.

Mr. Kramer: That is all.

Redirect Examination, by Mr. Winston.

Q. Before you got this injunction did Mr. Condra tell you you could have a separate local?

A. No, sir.

Q. And it was only after you got it until he agreed to it?

A. That's right. He said we would have to operate under the Benedict local and he had control as to who got a local and who didn't.

Recross-Examination, by Mr. Kramer.

Q. What actually happened was you and he agreed to leave it to the decision of the men, didn't you, and they had a vote on it to determine which one your men preferred?

A. My men always requested a local of their own.

Q. But I am asking you if they didn't take a vote or
455 something after the injunction was granted to determine which way?

Proceedings

A. No, it was before.

Q. You deny that?

A. It was before. The first of May the men asked me to go to Condra.

Q. I understand, but I am asking you if there was not another election, or an election, after the injunction was granted?

A. No, sir.

Mr. Kramer: That is all.

The Court: That is all.

(Witness excused.)

Mr. Winston: Will the Court indulge me one minute to confer with counsel?

The Court: All right, sir.

Mr. Winston: Benedict closes.

Mr. Kramer: Your Honor, we have a matter to call to the attention of the Court.

The Court: All right. Do you want the jury excused?

Mr. Kramer: Yes.

The Court: Let the jury be excused.

(Whereupon, the following proceedings were had in the absence of the jury:)

456 Mr. Rayson: May it please the Court, at this time on behalf of the plaintiff Trustees, we move for a directed verdict on the ground that there is no evidence upon which a finding of damages which may be offset against the claim of the Trustees could be sustained.

(Whereupon counsel presented argument to the Court.)

The Court: I overrule that motion.

Mr. Rayson: If your Honor pleases, we would also move on behalf of the International Union, United Mine Workers of America, and District 28, United Mine Workers of America, to direct a verdict for them in connection with the cross-action against them for damages, on the ground that there is no evidence which would support a finding of liability against those defendants.

Testimony of W. A. Boyle

(Whereupon, counsel presented argument to the Court.)

The Court: I have to overrule this motion.

Mr. Rayson: Then we have the motion to strike from consideration or being submitted to the jury the question on the water work stoppage because it is not within the scope of the contract; no showing any District officer had anything to do with it, or no showing that any field representative, and we move that the water question should be withdrawn at this time. And on the other hand that the question with reference to the work stoppage due to the \$1.90 rate and the \$1.50 rate is not within
457 the scope of the contract, and as to both of those at this time we move that they should be withdrawn regardless of the action of the Court on the motion.

(Whereupon, counsel presented argument to the Court.)

The Court: I am constrained to overrule these motions. I feel I should submit these matters to the jury.

Is there anything further?

Mr. Rayson: Nothing at this time.

The Court: Call the jury in.

(Whereupon, the following proceedings were had in the presence of the jury, to-wit):

W. A. BOYLE,

called as a witness by and on behalf of the cross-defendants, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Kramer.

Q. Will you state for the record your name as you usually sign it?

A. W. A. Boyle.

Q. B-o-y-l-e?

A. Right.

Q. Mr. Boyle, where do you live?

Testimony of W. A. Boyle

A. Washington, D. C.

458 Q. By whom and in what capacity are you employed?

A. I am employed by the United Mine Workers of America as assistant to the International President, John L. Lewis.

Q. How long have you held this position with the International Union?

A. I have been his assistant since January 1, 1948.

Q. Briefly, not in too much detail, will you outline your connection with United Mine Workers organization through the years preceding that.

A. Well, prior to coming to Washington I was the elected president of District No. 27.

Q. Where is that located?

A. The headquarters of District 27 is located in Billings, Montana, comprising the States of Montana, North and South Dakota, Wyoming and Alaska.

Q. Had you been a miner yourself?

A. Yes, sir. I have worked in the mines for a number of years, and I served in the capacity of an officer in the local union before I was elected to the office by the membership as president of that District.

Q. You are up to the presidency now.

A. Then after I served for a considerable time as president of the District, by the occurrence of the death of one of the International executive officers I was moved to

Washington as the assistant to President John L.
459 Lewis by the approval of our International Executive Board.

Q. And you have filled that position since 1949?

A. 1948.

Q. Briefly what are your duties?

A. Well, my duties as assistant to the President, International Union, are quite numerous, but all of the contracts, specifically deal with contracts.

Testimony of W. A. Boyle

Many assignments that I receive from day to day come in and I have to perform in his absence, and things of that nature, but all of the contracts—I think perhaps you are more interested in that—all of the contracts for all the associations and all the individual coal operators in the industry are in my office, and matters pertaining to contract or interpretations of contract usually come to my office.

Q. And these questions, as far as the miners are concerned of the United Mine Workers of America, where a dispute comes up requiring an interpretation then of the contract, as I understand it you handle through your office?

A. That is true, unless National in scope and may require an interpretation of the International President of a National character, but all disputes that come to the International office where an interpretation is required, why they come to my office.

Q. Are you familiar with the various contracts that were executed between operators and the United
460 Mine Workers of America, the International, beginning with the 1941 contract and going through the amendment of the 1950—that is the September 29, 1952 amendment of the 1950 contract?

A. I am, sir, for the reason that I served, since that period you have mentioned, with the National Policy Committee and also the Scale Committee that negotiated those contracts.

Q. In the contract which has been filed here as an exhibit, which is known in this record as the Appalachian Agreement, Exhibit No. 13, there are certain provisions, I believe, that were eliminated in the later contracts, is that right?

A. There are provisions in the later contracts that do not carry forward all the previous provisions of the 1941

Testimony of W. A. Boyle

and other contracts. They have either been deleted or by reference or re-written.

Q. Can you briefly state, or do you want a copy of the contract in your hands, and briefly state what those changes are.

Mr. Winston: Your Honor, I would object. If they were deleted they are no longer material.

The Court: This gentleman, if he knows about them, let him state them. If you take issue on any statement he makes you can cross examine and bring the contract before him. To save time just let him go right into it.

Mr. Winston: My objection is to the materiality.

461 The Court: I think it will be helpful to the jury and to the Court to know about that.

By Mr. Kramer:

Q. Will you go ahead with that briefly, with the changes in the contracts? Not too much detail but point out specifically so we get the significance of it.

A. Well, the 1941 contract provided for what we call the "No strike clause," and that was taken out.

That under the caption of "Settlement of Disputes," and it reads: "Should differences arise between the Mine Workers and the Operator as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at any mine, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately."

That was removed from the contract.

Q. That was removed from the contract, and is it or not in the 1950 or 1952 amendment?

A. No, it is not.

Q. Neither one. Go ahead with any other change you want without me going in and reading them to you.

Testimony of W. A. Boyle

A. Well, the illegal suspension of work clause was removed.

462 Q. Read that, and tell us about its removal.

A. "A strike or stoppage of work on the part of the Mine Workers shall be a violation of this Agreement. Under no circumstances shall the Operator discuss the matter under dispute with the Mine Committee or any representative of the United Mine Workers of America during suspension of work in violation of this Agreement."

That was removed.

Q. That was removed from the——

A. That is not in the 1950 contract. It is not in any contract, National contract, after 1947, or neither is it in the 1947 contract.

Q. It was in the original one which is referred to in these later, the 1941, but not the 1947 or 1950 or 1952?

A. Or any subsequent contract.

Mr. Winston: We object to Mr. Kramer leading the witness.

The Court: He is just trying to shorten this matter.

Mr. Winston: We have no objection to that.

By Mr. Kramer:

Q. Go ahead. Will you point out the difference, if there is a difference, between the 1950 and the 1952 contract, and then if I desire I will come back to them.

A. I am coming to that now, sir.

Q. Wait, did I overlook the one in 1945?

463 A. The 1945 contract—as I previously stated, the 1947 contract and all contracts subsequently made, don't carry the no strike clause. In the 1941 contract there was a no strike provision in the contract, and it was also true that was in the 1945 contract, but there was no no strike clause provision or agreement after 1947.

Q. That is what I thought you said. All right. Now then, go on to the 1950 contract.

Testimony of W. A. Boyle

A. In other words, it was not in violation of contract for men to strike after 1947.

Q. What about that no suspension of work pending grievance that was in the 1941 and 1945 agreements?

A. That was taken out.

Q. Do you recall which agreement that was removed in?

A. That was removed in the 1947 contract.

Q. And hasn't been in there since?

A. No.

Q. Go to the 1950 and 1952 contracts.

A. Do you want me, Mr. Counselor, to read this section in the 1947 contract that takes it out?

Q. Go ahead and read it; yes, sir.

A. Under the Miscellaneous provision of the contract, the 1947 contract, it specifically provides in paragraph 1.

"Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National 464 Bituminous Coal Wage Agreement of April 11, 1945, containing any "no strike" or "Penalty" clause or clauses or any clause denominated "Illegal Suspension of Work" are hereby rescinded, cancelled, abrogated and made null and void."

Q. Now, let's go down to the 1950 and 1952 contracts.

A. Now in the 1950 contract under "District Agreements," any District agreement may carry a no strike provision. That contract provides that in the National contract which supersedes all District or local agreements, and any agreement made by the local union or by the District in conflict with the terms of that contract, then the National agreement supersedes those agreements, and any District agreement that provides for any no strike clause must specifically be eliminated under the terms provided in this agreement.

Q. What agreement are you talking about, the 1950 or 1952?

Testimony of W. A. Boyle

A. I am talking about the 1950 agreement.

Q. That was the provision in the 1950 contract under the words "District Agreements" found on page 7. All right.

A. Now that reads: "This Agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by reference; and all local agreements, rules, regulations and customs heretofore established in conflict with this Agreement are hereby abolished. Prior practice and custom not in conflict with
465 this Agreement may be continued, but any provisions in District or Local Agreements providing for the levying, assessing or collecting of fines or providing for 'no strike,' 'indemnity' or 'guarantee' clauses or provisions are hereby expressly repealed and shall not be applicable during the term of this Agreement. Whenever a conflict arises between this Agreement and any District or Local Agreement, this Agreement shall prevail. When day men are transferred to loading coal the individual affected, if aggrieved, shall have the right of review under the settlement of disputes procedures provided in this Agreement.

"No District Contract or Agreement negotiated hereunder shall become effective until approval of such Contract or Agreement by the International Union, United Mine Workers of America, has been first obtained."

And in the previous contract it was provided—

Q. Let me call your attention to under the heading "Miscellaneous" the no strike provision has gone out, and I ask you to read the part of Miscellaneous, under the heading "Miscellaneous" on page 8.

A. Yes.

The Court: Of the 1950 contract?

Mr. Kramer: Of the 1950 contract, your Honor. It is under the heading "Miscellaneous" and it is paragraph 3.

Testimony of W. A. Boyle

A. "The contracting parties agree that, as a part
466 or the consideration of this contract, any and all
disputes, stoppages, suspensions of work and any
and all claims, demands or actions growing therefrom or
involved therein shall be by the contracting parties set-
tled and determined exclusively by the machinery pro-
vided in the 'Settlement of Local and District Disputes'
section of this Agreement; or, if national in character,
by the full use of free collective bargaining as heretofore
known and practiced in the industry."

That exclusive feature was removed from the contract.
By Mr. Kramer:

Q. That is what I am getting at now. When was that
provision which is in the 1950 agreement on page 8 under
the heading "Miscellaneous," when was that removed, and
explain?

A. In the 1952 Agreement.

Q. What part—what page and section so counsel can
follow?

A. That was on page 3 of the 1952 amendment to the
1950 agreement under "Miscellaneous."

Q. And will you read that, please?

A. "Amend 'Miscellaneous' by striking out subsection
4 and amending subsection 3 to read as follows:"

Q. So subsection 3 you read a minute ago on the other
agreement and it is amended now to read thus, and now
read it.

A. "3. The United Mine Workers of America and the
Operators agree and affirm that they will maintain
467 the integrity of this contract and that all disputes
and claims which are not settled by agreement shall
be settled by the machinery provided in the "Settlement
of Local and District Disputes" section of this Agree-
ment unless national in character in which event the par-
ties shall settle such disputes by free collective bargain-
ing as heretofore practiced in the industry, it being the

Testimony of W. A. Boyle

purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts.' "

"Amend 'Miscellaneous' by adding thereto the following, to become subsection 4:

"4. Each operator signatory or who may become signatory hereto hereafter agrees to give proper notice to the President of the local union at the mine by the 18th day of each month that said Operator has made the required payment to the United Mine Workers of America Welfare and Retirement Fund for the previous month.' "

Q. Now I want to take these two agreements under that heading of Miscellaneous, that paragraph 3, as it was in the 1950 agreement—if you can get that—and paragraph 3 in the 1952 amendment, and ask you if these are the words that are eliminated. This is a little leading. I think I can shorten this.

It was in the 1950 agreement under paragraph 3—

468 A. All right:

Q. Have you found it?

A. Yes.

Q. The words "and any and all claims"—in line number 2. Do you follow me?—"and any and all claims, demands or actions growing therefrom or involved therein . . ."

Do you see that?

A. Yes, I do.

Q. Are those words in the 1952 amendment or have they been eliminated?

A. They have been eliminated.

Q. They have been eliminated in the 1952 amendment?

A. Yes.

Q. Mr. Boyle, you are familiar with the organization, I take it, of the United Mine Workers throughout, with its setup?

Testimony of W. A. Boyle

A. I am, sir.

Q. Will you begin, and let's begin with the local union, the lowest level of the individual membership, and briefly explain to the Court and jury the setup and method of forming of the United Mine Workers of America.

A. I will try to be brief as possible, your Honor.

I was somewhat disappointed in the testimony that I heard here with respect—

Q. Don't comment on that. Explain it—what is
469 known as the International, sir.

A. There was a chart here to explain that was drawn by a witness that is completely and entirely misleading and it is not the way our organization is set up.

Q. You just explain how it is set up. You cannot comment on previous testimony.

A. Well, first of all our local unions are set up as separate units. The local union, in order to establish a union or have a local union to be established, there must be not less than 10 people who were requesting that there be a local union or that they want a local union, or that they want our organization.

Now after the organizer or the field representative has found by request of these people or by contact with these people, they want our organization then they go to their District office, wherever it is located, and they tell their District president that there is a group of people that want to organize.

Then the District president makes a request to the International Union that a charter be issued in the name and his recommendation as to why it should be issued, and he makes a request to the International Union to issue a charter.

Q. Can the District issue a charter?

A. No, the District cannot issue charters.

Q. Go ahead.

Testimony of W. A. Boyle

470 A. And then the International Union, subject to the approval of the International Executive Board, or by the approval of the International Executive Board, issues the charter, and the charter then is, after it is issued for this group of men or people, it is sent out to the District office and the local union is chartered.

Now, after the local union is set up, and the Constitution was introduced here of our organization and it will clearly show the Court that the local union is provided to make their own rules and regulations as long as they are not in conflict with the policy and principles of the International Union, and the local union is not dictated to in every respect by the International Union, neither are they dictated to by the District organization as to how to run their affairs.

They are privileged to run their affairs, elect their own officers and conduct their own affairs as long as they are in keeping with the Constitution of the organization and within the confines of the contract.

The contract between the operators and the United Mine Workers of America, wherever we may have a contract, supersedes any constitution or rules or policies of our organization. This we hold sacred and want it honored by both parties. That is the local union.

Q. Now sub-districts are set up. Districts are set up,
471 and in some instances some districts require a sub-district to be set up, and a district whether it be autonomous or be provisional they operate identically alike.

There is no difference in the operation of provisional districts and autonomous districts. The only difference is that the autonomous district—and I was in an autonomous district, elected in an autonomous district and served for a good many years—the only difference is that I was elected by the membership in that particular district.

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Q. To the presidency of the District?

A. To the presidency of the District. The function of the district is to work in the same manner. International Union permits these district offices to operate in keeping with the constitution and in line with the contract for the interest of the membership that they represent for the local unions within their territory or within their district. But neither does the district have the authority any more than the International Union has to dictate to a local union unless they are in violation of the terms of that constitution or this contract.

The International Union is comprised of the International Executive Board—

Q. Before you leave the district union, does the number of locals within a given district vary? There
472 may be so many, I take it, within one district and a larger number in another?

A. That is true, yes, sir.

Q. Go ahead.

A. The International Union and the International officers are elected by the rank and file membership of the entire organization. They are elected to office, and the International officers, their duties are prescribed in the Constitution that has been submitted, and they serve for a term and then they are required to run at the end of that term of office.

There is an International Executive Board that is comprised of one man—that makes up the International Executive Board, one man from each of the respective districts of the United Mine Workers of America including District 50. Every district has a representative on the International Executive Board.

Q. As a member of the International Executive Board?

A. That is true.

Q. All right.

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A. And then the International Union receives their mandates from the convention, which is the highest tribunal of the organization.

Q. And the convention meets how often?

A. Used to meet every two years. Now it meets
473 every four years. And attending this convention are the elected delegates from all the local unions throughout the United States, Canada and Alaska, and they are elected by the membership of the local unions that send those delegates to the convention and they number 3,000, sometimes more, 3,200, but it is a general thing that there is not less than 3,000 delegates to a convention.

Now prior to a convention, why the local unions, according to the Constitution the local unions are urged to submit resolutions—thousands and thousands in number—which are considered and are referred first to a resolutions committee, constitutions committees, scale committee—all the various committees of the convention and they consider those resolutions, and then they go, each and every one of them, before the convention and the delegates to that convention make this constitution, issue the orders that they want done and the officers of the International Union—all of the officers now of the International Union—are commanded by the convention to carry out the mandates of that convention.

It can be very quite possible that the officers may not concur in all the things that might be passed by the convention, but by convention action they are mandated to carry those things out until changed at the next convention, if they are changed.

474 Then the convention, in addition to all the work they perform, they establish at each convention a policy committee, and the policy committee is comprised—

Q. And it serves how long now?

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A. Serves during conventions.

The policy committee, the International convention provides for the policy committee to be set up, then they return that to the local union and the local unions elect from their local union their representation on that policy committee.

Q. What are the duties and functions of that committee?

A. The policy committee has the power, is empowered by the convention to negotiate, to pass on negotiations and to examine any negotiations that may be negotiated by the scale committee.

That policy committee acts between conventions in all matters that may come up for approval or disapproval by the negotiators of the contract.

Each contract receives the approval of the policy committee after the wage scale committee, of which I said just previously I am a member, a member of both of them—after the negotiators have negotiated that contract then the policy committee must approve or disapprove the contract.

Q. You made mention of one other matter that we skipped over. You mentioned the Executive Board.
475 Would you please explain to us how it is composed and its functions.

A. Well, the International Executive Board is the highest tribunal of the organization between conventions. The International Executive Board, any action on the part of the officers, President Lewis or his associate International officers, must receive the approval of the International Executive Board.

Q. And how is it composed?

A. The International Executive Board members are—the Board is composed of one member from each of the Districts of the United Mine Workers of America.

By the Court:

Q. How many districts are there, about?

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A. It runs from one to 31, but a couple of districts in there—No. 24 is out. I can tell you in a few minutes. There is one or two out, and then that is about, approximately—No. 24 is out, that was up in Michigan. They are not mining coal there any more. There is one other out—it is about 28 districts.

By Mr. Kramer:

Q. 28 or 29 districts?

A. That's right, and that includes District No. 28.

Q. Which is the one here involved?

A. Yes.

Q. Mr. Boyle, there has been a lot of testimony in 476 this record with reference to a work stoppage which occurred in May, 1953, and it is undisputed that stoppage occurred over an adjustment in the scale of wages. I believe there was an increase presented or negotiated at that time—I got the wrong date. It is October, 1952.

Are you and were you, in your official position, familiar with what transpired in connection with that matter?

A. Yes, sir, I am.

Q. Was a new wage scale negotiated?

A. During the month of September, 1952, negotiators were working—more especially in the month of September—toward making a contract or agreeing upon a contract.

That contract was agreed upon between the parties and was signed in Washington, D. C., on September 29, 1952. That contract called for \$1.90 per day increase to all mine workers.

Q. Who actually did the negotiating for that agreement?

A. That particular agreement was negotiated by Mr. Harry L. Moses, the president of the Bituminous Coal Operators Association, and President John L. Lewis of the United Mine Workers of America.

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Q. And that Bituminous Coal Operators Association represented all bituminous operators with whom the United Mine Workers of America had contracts at that time?

A. All those that were members of the Bituminous
477 Coal Operators Association and the Virginia Coal Operators Association were members of that group.

Q. At the time that agreement was negotiated you say you were familiar with those negotiations. What was the situation with reference to wage stabilization?

A. Well, I recall very clearly I was there. There was nothing said between the negotiators of the contract at the time the contract was signed or prior to that time to my knowledge with respect to any approval of the Wage Stabilization Board.

The contract was entered into by the negotiators in good faith and was a firm contract as far as our union and its president was concerned.

Q. Let's get both. There were two organizations, in a way, at that time. One was the Wage Stabilization Board and the other was the Wage Stabilization Administrator, I think. There was no reference to either of these Governmental bodies?

A. No.

Q. Go ahead.

A. Then the contract was entered into, signed and sealed in Washington, D. C., on the 29th day of September and was to become effective on October 1.

Q. That granted the \$1.90 increase?

A. With the \$1.90 increase. Then, as I recall, why
478 Mr. Moses, the negotiator for the operators, made some mention of the fact that this was going to require approval of the Wage Stabilization Board.

President Lewis took the position that we had a contract, that it did not require Wage Board approval because it came within the limitations of approval by the

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Board, and Mr. Moses thought it best he submit it for approval and did so.

Now that set off because it got widespread publicity in the newspapers, the radio and television, news commentators, wide publicity, notwithstanding we had a firm contract with the coal operators, that it was not going to be approved and there was some question in some of the minds of some of the operators to whether Mr. Moses would be successful in getting it approved before the Wage Stabilization Board.

When that happened there in the early part of October, some of the mines started going out throughout the different sections of the country.

Q. You mean going out, shutting down, miners stopped working?

A. The miners started refusing to return to work. And the knowledge I had of it is the newspapers, news commentators, reading the newspaper, that this was at the Peabody Coal Company which was a large producer in the State of Illinois.

479 First knowledge I had of that particular strike was when I read it in the newspapers, and it came out in the Washington paper that that mine went out because of the fact that they were not getting \$1.90. That was even before the Wage Stabilization Board had disapproved the \$1.90.

I think that one reason was that there was a difference in their pay period in that particular section of the country, and when the men and employees did not receive \$1.90 knowing that we had a signed contract with the industry and with their operators and they did not get the \$1.90 even before the Wage Stabilization Board disapproved it, then they shut down. They wanted their \$1.90.

Q. That was the first pay period after October 1?

A. That's right, because they paid that way in those particular mines.

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Then that started spreading and spreading and here and there and then the men really remained away from work after, I believe the date was October 18 when the Wage Stabilization Board said that they would approve \$1.50 and that is all they would approve. Then the mines really started going down throughout the entire industry.

By Mr. Kramer:

Q. You were here yesterday afternoon, I think, in the Court room and heard read into this record a letter written by Mr. Lewis in response to an inquiry they said of 480 a letter written by Mr. Moses, Mr. Moses being President of the Bituminous Coal Operators Association, but there was not read into the record the letter from Mr. Moses to Mr. Lewis.

Do you have a copy of that letter in your file?

A. I do, but it is back there, your Honor. Wait a minute; I may have brought it with me. President Lewis' letter was read yesterday.

Q. But was Mr. Moses' letter?

A. No.

Q. And the Lewis letter, it is in reply to the Moses letter?

A. That's right.

Q. Have you had prepared from your copy other copies which are exact reproductions of the one you have here?

A. This is an exact copy of it.

Mr. Kramer: I want to file this as Exhibit No. 25, and I will pass all concerned copies for convenience.

(Exhibit No. 25 was filed.)

Mr. Kramer: This letter, on the letter head of

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“Bituminous Coal Operators’ Association
The World Center Building
918 Sixteenth Street, NW
Washington 6, D. C.

October 20, 1952

“Office of the President

481 “Mr. John L. Lewis
President, International Union
United Mine Workers of America
United Mine Workers’ Building
Washington 5, D. C.

“My dear Mr. Lewis:

“The Bituminous Coal Operators’ Association and the United Mine Workers of America, represented respectively by us, negotiated and executed the collective bargaining agreement entitled the National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952.

“Our Association unilaterally and without reservation has urged the Wage Stabilization Board to approve the \$1.90 increase called for in this agreement. On October 18, the Wage Stabilization Board decided that any wage increase payable under this agreement must be limited to \$1.50 per day, effective October 1, 1952.

“We notified you at the time the contract was signed that we could legally pay only the amount permitted by the Wage Stabilization Board. The operators, members of the Bituminous Coal Operators’ Association, are therefore putting into effect the amount of wage increase approved by the Board, \$1.50 per day, effective October 1, 1952. Our willingness to pay the full amount, \$1.90 per day increase, is restrained only by the legal limitations imposed by the Board. We are not informed as to any

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possibility of review or reconsideration of the
482 Board's action, but if any such review or reconsideration should make legal the payment of the \$1.90 increase, we would of course abide by such result.

"Our latest information is that very few, if any, of the coal mines operated by our members are in production because of failure of the employees to show up for work. We respectfully request that you strongly urge our employees to return to work so that our contract may be carried out to the extent permitted by law.

"Very truly yours:

/s/

"Harry M. Moses,
President."

Now in response to this Mr. Lewis wrote a letter which has been filed as an exhibit, and I do not recall the number, but it was read yesterday and I will not take the time to re-read it.

By Mr. Kramer:

Q. After this passage of letters between Mr. Lewis and Mr. Moses, can you tell us what occurred with reference to the wage increase, and if so please do.

A. Yes, sir. Then Mr. Moses and President Lewis jointly asked Mr. Putnam, as I recall it, the Economic Stabilizer of the Economic Stabilization Board, for an appeal and review of the finding of the Wage Stabilization Board, and set forth in there——

483 Q. Before you go into that, which we will come to in a moment, what had happened in the meantime throughout the country in the coal fields with reference to operation of the mines?

A. They were practically all down. They were going down because there was no approval of the \$1.90.

Q. You stated that Mr. Lewis and Mr. Moses wrote a

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joint letter to Mr. Roger L. Putnam, the Economic Stabilization Administrator, an appeal. That was done in writing?

A. Yes, sir.

Q. And do you have a copy of that joint appeal?

A. I don't think I do have that with me. Yes, I do, too.

Q. And have you had prepared from the original copy that you have other copies?

A. Yes, sir.

Mr. Kramer: I want to file the original of this as Exhibit No. 26.

(Exhibit No. 26 was filed.)

Mr. Kramer: This communication reads as follows:

“Washington, D. C.

October 24, 1952

“The Honorable Roger L. Putnam
Economic Stabilization Administrator
Economic Stabilization Agency
811 Vermont Avenue, Northwest
Washington, D. C.

484 . “Dear Sir:

“On September 29, 1952, the Bituminous Coal Operators' Association and the United Mine Workers of America completed two months of negotiations for the renewal and extension of their labor contract, entitled National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952.

“This contract provided for an increase of \$1.90 per day in wages and additional contribution of 10¢ per ton to the United Mine Workers of America Welfare and Retirement Fund.

“On October 1, 1952, the Bituminous Coal Operators' Association submitted this contract to the Wage Stabiliza-

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tion Board and requested its approval, effective as of that date. After a conference with the Chairman of the Board and discussions with the Board's staff, additional data was submitted and the Board conducted a hearing on October 10, 1952.

"On October 18, 1952, the Board announced a decision approving \$1.50 per day of the wage increase and disapproving the 40 cents per day of the contract in excess of that. On October 21, 1952, the Executive Director of the Board advised us that the 10 cents per ton increase in Welfare Fund payments did not require Board approval.

"Following this action of the Board, practically
485 all the employees of the coal mines covered by this contract failed to report for work on Monday, October 20, and a continuous shutdown of the coal mines in the country has been in effect since that date.

"The bituminous coal mining industry is unique among American industries. It is the only industry in the country that operates underground, on a mass production, high-speed, assembly-line basis, turning out a product that supplies almost 40 percent of the nation's total energy needs and many other essential needs of the nation. Its treatment under an economic stabilization program should be subject to special considerations.

"The mass production nature of the industry is indicated by the fact that its annual output runs into hundreds of millions of tons. For example, 535,000,000 tons were produced in 1951. Almost 80 per cent of this stupendous production came from beneath the surface of the earth. The laboriousness of the work entailed in this industry is demonstrated by the fact that approximately 100,000,000 tons of this coal were loaded onto mine cars or conveyor belts by being shoveled by hand.

"The assembly-line nature of the work is emphasized by the fast tempo at which the cycle of mining operations

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is carried on. The cutting of the coal by machine,
486 the drilling and blasting, the loading by machine or
by hand, and the transportation of the coal through
the mine and to the surface are all carried on at a pace
that results in a production rate per man-day that is not
approached anywhere else in the world. This assembly-
line mass production is attained despite the space limita-
tions imposed by the sub-surface locale of the operations.
It is impossible to equate this industry with any other in-
dustry.

“The industry is serviced by a limited labor force that
must meet requirements of disposition, physical strength,
and mechanical aptitude that are not ordinarily required
in other industries. Historically, there have arisen prob-
lems in labor relations that are peculiar to this industry.
In the last decade, failure of the collective bargaining
process to function has inevitably led to seizure and opera-
tion by the Federal Government.

“The first instance of this was 1943. This seizure lasted
for five months and twelve days from May 1, 1943, to Oc-
tober 12, 1943.

“Twenty days later, on November 1, 1943, the industry
was seized again. This seizure lasted for six months, from
November 1, 1943 to May 31, 1944. This seizure was not
terminated in the southern producing area until June 21,
1944.

487 “There was a third seizure of certain coal mines
that became involved in supervisory strikes during
September and October of 1944.

“There was a fourth seizure, involving certain mines,
from April 10, 1945 until June 3, 1945.

“The fifth seizure occurred when the coal industry
was seized on May 21, 1946. This period of seizure and
operation by the Federal Government continued for more
than thirteen months until June 30, 1947.

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"In the light of this history, it is clear that a break-down of the collective bargaining process in this industry does not involve merely an immediate economic loss to the employers and employees. Since this industry turns out a product indispensable to many important industries of the nation, and is so basic to the nation's welfare, such a break-down may well lead to a deprivation of the very right to operate under the free enterprise system.

"The last failure of collective bargaining in the industry, in 1949-1950, created such conditions that the President of the United States was forced to ask the Congress to pass legislation authorizing the seizure of the industry by the Federal Government. He recommended legislation that would have authorized the creation of a board to establish the proper compensation of the 488 employers for the use of their properties and of a board to establish the proper compensation of the mine workers.

"When it is considered that Congress has stated that the authority conferred by Title IV of the Defense Production Act should be exercised with full consideration and emphasis on 'the maintenance and furtherance of the American way of life,' it is submitted that the bituminous coal industry is a unique case where failure of collective bargaining necessarily leads to a departure from the American way of life.

"The contract which was submitted for approval was negotiated by the traditional collective bargaining process of the industry. In the course of these negotiations, the United Mine Workers presented requests for fringe benefits that, it seems clear to us, the Board could and would have approved. These so-called fringe benefits were for a reduction in the hours worked per day, increased shift differentials, increased vacation pay, and the institution of paid holidays. It is our belief that the negotiation of

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compensation increases in terms of compensation for hours of productive work rather than in terms of fringes contributes to stabilization in the stimulus it adds to productivity.

“Therefore, the negotiations were aimed at a full translation of all fringe benefit proposals into direct
489 wage increases. These were all considered and resolved in the wage payment of \$1.90 which was finally negotiated.

“The vacation payment of \$100 has not been increased since 1946. We believe the Board could have approved an increase in these benefits that would have constituted a payroll cost of 5 cents per hour.

“Bituminous wage contracts have not ever embraced the device of paid holidays. We believe the Board could have approved an agreement for six paid holidays that would have constituted a payroll cost of over 7 cents per hour.

“The bituminous coal miners are paid shift differentials of 4 cents per hour and 6 cents per hour. Many less arduous industries have higher rates. We believe the Board could have approved an increase in shift differentials that would have constituted a payroll cost of approximately $1\frac{1}{2}$ cents per hour.

“These items, plus the 13 cents per hour granted by the Board as a cost-of-living increase, total in excess of the agreed payment of \$1.90. It is submitted that all these specific items related above, as they regard this industry, constitute important economic considerations which should be given great weight in the policy-making administration of any stabilization program.

490 “The principal contribution to stabilization policy that this contract makes which does not lend itself to ready evaluation is the fact that agreement was reached, after concessions on each side, without a shutdown in the industry. Failure of approval by competent authority defeats this purpose.

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"To conclude, it is respectfully submitted that, in the light of the above considerations, it would be appropriate for the Administrator to review the decision in question and permit the allowance of the additional 5 cents per hour so that the full \$1.90 per day negotiated increase may be paid and the industry returned to full operation.

"Very truly yours,"

The original is signed by John L. Lewis, President, United Mine Workers of America, and Harry M. Moses, President, Bituminous Coal Operators Association.

By Mr. Kramer:

Q. After this joint appeal was made to Mr. Putnam, what occurred, Mr. Boyle?

A. Well, following that, I believe that letter was dated October 24?

Q. That's right, 1952.

A. Following that the President of the United States invited Mr. Moses, Mr. Lewis, Mr. Putnam and David L. Cole, and I believe David Charnay—

491 Q. Mr. Steelman, the President's assistant?

A. Mr. Steelman was also there, to a conference at the White House at which time and during the conference Mr. Moses suggested that the industry return to work, that \$1.50 be paid immediately and the 40¢ be held in escrow by all coal companies, and that the matter be again reviewed by the Board looking toward approval of the 40¢. President Lewis agreed with the President of the United States that he would go along with that.

Q. At the conclusion of that meeting did the President of the United States issue to the public and to the miners, operators and others, a statement?

A. Yes, sir.

Q. Do you have a copy of that statement?

A. Yes, sir.

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The Court: Mr. Kramer, just tell us what is in that without reading all of it.

Mr. Kramer: This is only less than one page. I think I can read it as quick.

The Court: Are you going to read any more of these?

Mr. Kramer: Two short telegrams, your Honor, very short telegrams, is all.

The Court: I will let you do that.

Mr. Kramer: This is the statement of the President of the United States, October 26, 1952.

492 "Because of the situation now prevailing in the bituminous coal mining industry, and its direct relationship to defense mobilization, it was deemed advisable to call a conference this evening at the White House. At my invitation there were present Messrs. Harry M. Moses, President of the Bituminous Coal Operators' Association; John L. Lewis, President of the United Mine Workers of America; John R. Steelman; Roger L. Putnam; and David L. Cole; and also David B. Charnay, public relations adviser to John L. Lewis.

"The entire subject was fully discussed. This is not an ordinary situation and does not comprise a labor-management dispute per se. Therefore, in the best interests of the American system of free and open collective bargaining, Mr. Putnam assured the parties that serious and prompt consideration would be given to the request for the review of the recent ruling of the Wage Stabilization Board, in light of the circumstances set forth in the joint letter of Messrs. Moses and Lewis and, of such additional facts as may be pointed out to him hereafter.

"Mr. Moses stated that the operators who are affiliated with his organization are prepared to start paying immediately the \$1.50 of the wage increase now allowable
493 and to set aside available for payment to the miners, when and if approved, the balance of the increase

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amounting to 40 cents per day, retroactive to October 1, 1952.

"It seems to me, in view of the foregoing, that avoidable hardship is being suffered by the industry, the miners, and by the economy as a whole in the continued inactivity of the mines while the orderly procedures are being followed.

"I have, as a result of this conference and in the common good, urged Mr. Lewis, as President of the United Mine Workers, to use his best efforts to effect at once a resumption of work in the mines. Mr. Lewis has assured me of his cooperation."

(Exhibit No. 27 was filed.)

By Mr. Kramer:

Q. Immediately following that release by the President of the United States what if any steps was taken by Mr. Lewis?

A. President Lewis wired all Bituminous Districts, International Executive Board, to use their best efforts to get their mines restored to operation in their District.

Q. Do you have a copy of the telegram?

A. Yes, sir.

Q. Has it been compared with the original?

A. Yes.

Mr. Kramer: I want to file this telegram as
494 Exhibit No. 28.

(Exhibit No. 28 was filed.)

Mr. Kramer: This telegram reads as follows:

"Western Union Telegram

Washington, D. C.

October 26, 1952.

"The Joint Industry Request to the Executive Branch of the Government for Approval of the Industry Agreement is Pending. It Will Require a Reasonable Time for

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Review of Attendant Facts and the Reaching of a Decision. It Is My Opinion That Our Industry Should be Operating During That Period and That the Best Interests of the Mineworkers and the Public Will Thus Be Served. * I Am Therefore Requesting an Immediate Resumption of Operations at All Mines in All Districts and I am Urging Each Member of Our Union to Return to Work at Once. Please Notify All Local Unions and All Members of This Message and Utilize the Services of All Officers and Field Representatives in Notifying the Membership and Requesting Their Fullest Cooperation. Please Acknowledge Receipt of This Telegram and State What Steps are Being Taken in Your District.

“John L. Lewis.”

By Mr. Kramer:

Q. Now, did Mr. Lewis send another telegram on the 495 same day?

A. He did, to the International Executive Board members.

Q. To all the members of the International Executive Board?

A. Yes, sir.

Q. Do you have there a copy of that telegram?

A. Yes, sir.

Q. And have you had prepared copies for use here?

A. I have.

Mr. Kramer: I want to file this as Exhibit No. 29.

(Exhibit No. 29 was filed).

By Mr. Kramer:

Q. The question has been asked, and will you state to whom it was addressed, the one I read a minute ago?

A. Addressed to all District Presidents, the presidents of all of the Districts.

Q. Of the United Mine Workers?

A. Yes.

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Q. The one we are about to read is addressed to whom?

A. Members of the International Executive Board.

Q. Of the United Mine Workers of America?

A. Yes.

Mr. Kramer: It is dated at Washington, D. C., October 26, 1952.

496 "Western Union Telegram

"Have Just Telegraphed the Presidents of Each District Requesting They Advise Membership to Return to Work Pending Determination of Industry Appeal for Validation of Contract by the Executive Branch of the Government. Will Be Glad to Have Your Cooperation With the President of the District in Urging Immediate and Fullest Cooperation of Our Membership With Request.

"John L. Lewis."

By Mr. Kramer:

Q. Now after that meeting in Washington, the Presidential release and the sending of these telegrams, what occurred with reference to the work stoppage?

A. I am just trying to think of the date there. The Board approved the \$1.90.

Q. Did the mine open up and go right on back to work even prior to approval?

A. Yes. The mines returned to work very rapidly or they went back to work when they found it was \$1.55 and by request of President Lewis.

Q. Later on was the entire \$1.90 approved?

A. It was approved, \$1.90.

Q. Retroactive to October 1st?

A. Yes, sir.

Q. Were the telegrams that were sent by Mr. Lewis
497 to the District presidents and also the ones sent to the International Board members which have been read here, released to the press?

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A. They were.

Q. Given wide publicity?

A. They were.

Q. Mr. Boyle, there were filed here day before yesterday, I believe, as Exhibit No. 6, a copy of a letter written by Mr. Darst to Mr. Lewis talking about a work stoppage which had commenced on May 18, 1953.

In your position as assistant to President Lewis, did you know about this letter?

A. I do.

Q. In this letter statement is made that it began Monday morning, May 18, this mine was shut down illegally by your union. Do you have any correspondence from the International Union showing what was done with reference to receipt of this letter?

A. I don't have it with me. I have it in my files, back there.

The Court: Take a short recess, gentlemen.

(A short recess was had.)

The Court: All right, gentlemen, proceed with the witness.

498 By Mr. Kramer:

Q. Mr. Boyle, there is in this record filed as Exhibit No. 6 a copy of a letter written by Mr. Darst to Mr. Lewis. Did that letter come to your attention?

A. It did, sir.

Q. Do you have a file of what was done in connection with that in the International?

A. I have.

Q. Will you let me have that file, please, sir.

A. My letter is there.

Q. This is built from the bottom up?

A. Yes, sir.

Q. There was also filed in this record a letter that was written by Mr. Allen Condra, the President of District

28, United Mine Workers of America, to Mr. Darst as a reply to the copy of the letter written by Darst to Mr. Lewis of which Mr. Darst sent Mr. Condra a copy. Do you have that copy also in your file?

A. I do.

Q. Do you have any further information of what transpired as far as International was concerned in connection with that letter?

A. Yes, I have the file and, your Honor, it is complete. Only part of the file was submitted before. I have a complete file here.

499 Q. Do you have a complete file?

A. Yes.

Q. In other words, you have the original letter written by Mr. Darst to Mr. Lewis?

A. Yes, sir.

Q. Do you have the reply written by Mr. Condra, or a copy of the reply written by Mr. Condra to Mr. Darst?

A. Yes, sir.

Q. You have a copy of what else in there?

A. I have the copy of a telegram by Mr. Condra, President of the District, to President Lewis.

Q. Read that will you please, sir.

A. The telegram is dated—

Mr. Winston: Your Honor, could we see that?

Mr. Kramer: Yes, sir.

Mr. Winston: We may have objection to it.

Mr. Kramer: Yes, sir. I will show him the whole file so he can see it, your Honor.

By Mr. Kramer:

Q. We were talking about a telegram, dated May 28, 1953, that you said Mr. Lewis had received from Mr. Condra. Will you read it, please, into the record.

A. "John L. Lewis, President, United Mine Workers of America, Washington, D. C. The Benedict Mine of the

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Benedict Coal Corporation, St. Charles, Virginia, resumed operation this morning, May 28."

That is signed, "Allen Condra, President, District 28, U. M. W. A."

By Mr. Kramer:

Q. Following that telegram received from Mr. Condra by Mr. Lewis, what next was done with reference to the International in connection with that?

A. On May 29 President Lewis addressed the following letter to Mr. Condra, President, District No. 28, Miners' Building, Norton, Virginia:

"Dear Sir and Brother:

"Thank you for your letter of May 27 with enclosure; and also for subsequent telegram of May 28 with respect to the Benedict Mine of the Benedict Coal Corporation, St. Charles, Virginia.

"I am glad to have this information."

"Good wishes.

"Sincerely yours."

Q. Was there any further communication on the matter?

A. Then on June 3, 1953, I addressed the following letter to Mr. Guy B. Darst, Vice-President, Benedict Coal Corporation, St. Charles, Virginia.

Q. Who did that?

A. I did.

Q. Read the copy you have.

501 A. "Dear Mr. Darst:

"Upon my return to the office, President Lewis asked me to acknowledge your communication of May 20, 1953.

"I contacted Mr. Allen Condra, President of District 28, UMW, and he informed me that your mine was presently

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operating. Under these circumstances it would appear that this controversy has been settled.

"Sincerely yours,

"W. A. Boyle,

"Assistant to the President."

Q. Is that the complete file on it?

A. That is the complete file.

Q. Mr. Boyle, you did not have copies of those made, did you, for the record?

A. No, I don't.

Q. Will you tonight have copies of these four communications that have gone in just now and file them as a collective exhibit tomorrow morning, Collective Exhibit No. 30?

A. I will.

Mr. Kramer: Any objection over here?

Mr. Winston: None.

(Exhibit No. 30 was filed.)

By Mr. Kramer:

Q. Mr. Boyle, do you have a copy of a communication sent out on October 24, 1951, by Mr. John L.

Lewis, President of the United Mine Workers of America, Mr. Thomas Kennedy, Vice-President of the organization, Mr. John Owens, Secretary-Treasurer, to all members, Committeemen and Officers of all Local Unions of the United Mine Workers of America?

A. Yes, sir. This is under date of October 24, 1951, from the International Union.

Mr. Kramer: I am going to file this as Exhibit No. 31. I will have copies made tonight and file them as Exhibit No. 31.

(Exhibit No. 31 was filed.)

A. (Continuing) This is over the signature of the three International resident officers, Mr. Lewis, Mr. Kennedy and

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Mr. Owens, to all Members, Committeemen and Officers of All Local Unions, United Mine Workers of America.

“Dear Sirs and Brothers:

“During the past year a wave of unauthorized local strikes or work stoppages occurred in various Districts. In nearly all of these strikes or stoppages the machinery incorporated in joint agreements for the consideration and disposition of grievances was not invoked. The International Executive Board, now in session in Washington, D. C., has given consideration to the implications involved in these strikes or stoppages and reached the following conclusions thereon:

503 “1. These unauthorized strikes adversely affect the contractual relationships between the United Mine Workers of America and the coal operators.

“2. Unauthorized strikes cause unnecessary loss of earnings to our members, work hardship upon their families and are not beneficial to the interests of the communities wherein they occur.

“3. Unauthorized strikes reflect discredit upon our organization's sixty-year record of honoring contractual provisions and result in strained labor relations between the parties signatory to the joint agreements.

“4. In some instances these unauthorized work stoppages have created situations wherein union operations have not been able to meet their commitments and this resulted in these operations losing business to competitors.

“5. The joint agreements between our organization and the coal operators contain established machinery for the adjustment of disputes between the parties signatory thereto which eliminates the necessity for calling strikes.

“6. These unauthorized strikes not only endanger the stability of the coal industry, but encourage the operators to demand punitive clauses in wage agreements.

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“On the basis of the foregoing conclusions, the International Executive Board, by unanimous vote, urges
504 all members, local union officers and committeemen, district and international officials to not only refrain from participation in these unauthorized strikes, but to use their efforts and influence to prevent occurrence of said unauthorized strikes in contravention of the International Constitution and in direct opposition to the established policies of the United Mine Workers of America.

“We express the hope that the policies outlined herein will be followed in the best interests of our organization and our membership.

“On behalf of the International Executive Board, United Mine Workers of America.

“/s/ John L. Lewis,
President.

“/s/ Thomas Kennedy,
Vice-President.

“/s/ John Owens,
Secretary-Treasurer.”

Mr. Kramer: I am retaining this to have copies made tonight.

The Court: All right.

Mr. Kramer: I am leaving opposing counsel with a copy.

The Court: All right.

By Mr. Kramer:

Q. I overlooked a moment ago one thing, Mr. Boyle.
505 We were talking about the letter that Mr. Darst had written and the file of correspondence.

Did the International receive from Mr. Darst any other communications of any kind during the period of the so-called unlawful strikes, these work stoppages, between 1950 and 1953 except the one letter that you have here?

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A. No.

Q. What have you done to be sure your statement is accurate?

A. Well, when I learned of the Court action I caused a diligent search to be made, not only of my office where all contract matters are kept in the International Union, but all offices in the International Union, a search to be made to determine whether or not there was any correspondence from this coal company pertaining to any illegal unauthorized work stoppage, and this letter is the only letter we have received. That is the only information we have from any of the contacts Mr. Darst may have through his associations both in Washington and in Virginia.

Q. I will ask you whether or not on the unauthorized strikes or work stoppages it is the custom usually for the operator where this is involved, or for the association to which he belongs, his company belongs, to take it up with your office?

A. Yes, sir.

506 Mr. Winston: We object to that, sir; immaterial.

The Court: Overruled.

Mr. Winston: Exception.

By Mr. Kramer:

Q. What is the answer?

A. Wherever local unions are unruly and causing irreparable damage to the coal company, loss of wages to coal miners, disrupting the community life and disregarding and not honoring their contract and the clauses to our contracts, we immediately do something to prevent that or to correct it.

Q. Now, my question that I really asked was this: Is it customary for these operators and the associations they belong to to call your attention to these matters?

A. They do, sir.

Q. Do field representatives of the Districts have any authority to call strikes?

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A. They are prohibited from calling strikes not only by the contract, but by the Constitution of the United Mine Workers of America. Neither do District officers in any capacity have authority to call strikes.

Mr. Kramer: Cross-examine.

507

Cross-Examination,

By Mr. Winston:

Q. Mr. Boyle, your office knew about these strikes, didn't they?

A. My office knew, sir, about what?

Q. These strikes in the Benedict coal fields?

A. No, sir.

Q. Knew about none of them?

A. About any of them except the one, Mr. Counselor, that Mr. Darst wrote to us. The only information we have in the International headquarters is the letter Mr. Darst wrote.

Q. But your District 28 office knew about them, didn't they?

A. Presumably they may have known about them. I wouldn't know, they never called it to my attention.

Q. And it was the duty of the District officer and the field representative of the District to adjust those strikes and disputes, wasn't it, under the contract?

A. It is their duty to adjust disputes, that is true, and where work stoppages occur in violation of the terms of the contract—the letter speaks for itself, that went out in 1951 to all of them for that matter, that they were not to engage in any of these illegal work stoppages or play any part in them. It is not my understanding the District office so did.

508 Q. But that is their job, isn't it?

A. To what?

Testimony of W. A. Boyle

Q. That is the job of the District officer and field workers to adjust these disputes with the coal company.

A. Yes, sir.

Q. Yes, sir.

A. Under the terms of the contract.

Q. That is it exactly.

A. If it comes to their attention under the terms of the machinery of the contract.

Q. You were talking about these contracts. I believe we had the 1950 and the 1952 contracts. You stated in the 1952 contract, paragraph 1 under "Miscellaneous"—do you have yours, sir?—Correction, the 1950 contract, page 8, paragraph 1, under "Miscellaneous."

A. Yes, sir, I have it.

Q. That certain provisions in the Appalaehian Joint Wage Agreement of June, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing "No strike" clauses or "Penalty" clause or clauses or any clause denominated "illegal suspension of work" are herewith rescinded, cancelled, abrogated and made null and void.

That is, they were no longer effective, is that right?

A. That is right.

509 Q. And in their stead, or instead of that you had paragraph 3 in which the contracting parties agree that as a part of the consideration of this contract any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the "Settlement of Local and District Disputes" section. Now that was in there instead of the former provision, is that correct?

A. Yes, sir.

Q. And that language meant what it said, didn't it?

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A. Yes, sir.

Q. I mean, the union understood what it meant.

A. Yes, sir.

Q. You also had affirmed your intention to maintain the integrity of this contract and to exercise the best effort through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes. That meant what it said, didn't it?

A. Yes, sir.

Q. And then the union did not like those two clauses so when you had the 1952 contract you changed them, isn't that correct?

A. Now I wouldn't go insofar to say that the union did not like those clauses that is why they were changed.

510 Q. Were they changed?

A. Those were negotiated changes in the contract and the negotiators of the contract agreed for other reasons, not exclusive, so that the mine workers did not like those recommendations and the operators and the negotiators in some instances equally did not like the clauses that were in it.

Q. You mean the operators did not like a clause which allowed the union to discipline their members for work stoppages, to prevent work stoppage?

A. This doesn't—

Q. Is that what you are telling us?

A. Just a minute, Mr. Counselor.

Q. Well, you answer. I don't want to stop you.

A. I want to say that this disciplinary action referred to in here is not a one-way street. This is a contract between the parties, and it says here that "The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions growing

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therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the 'Settlement of Local and District Disputes' section of this agreement."

Then it goes on to say in paragraph 4, "The United
511 Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts to available disciplinary measures"—it mentions the parties to the contract, not only one party—and "to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement."

Now that was in the contract that both parties were expected to live up to those provisions.

Q. Yes, sir. I am glad you brought that out, that the operators were supposed to do that too, sir.

Now you mean to infer or say that the operators wanted to give up some right they had to discipline workers for work stoppages?

A. This is a negotiated matter. Your first question to me, Mr. Counselor, was to the effect that the mine workers did not like this clause so they took it out.

They could not take anything out of the contract unless it was negotiated out of the contract and the parties agreed by negotiation to take it out.

Q. Yes, sir. That was not exactly my question. What I wanted to know, isn't it the mine workers that wanted it taken out, if you can answer that.

A. I can't answer, if you would want it answered,
512 for the reason I think that the parties in negotiating the contract agreed that the law itself, the Labor Management Relations Act of 1947 set up certain rules and regulations as to what we can and cannot do as far as disciplining members of our organization, and the oper-

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ators recognizing that fact did not want to be a party to it any more than the mine workers did. And that was after there was some punitive cases filed against the United Mine Workers under that act, that the operators did not want to be a party to a contract that was going to cause them to do things which under the Taft-Hartley Act was prohibited.

Q. I want a plain and simple answer, that is, did the mine workers want that part of the 1950 Agreement done away with?

A. It is my understanding both parties wanted it done away with.

Q. And the operators did too?

A. That is my understanding, the contract negotiators on both sides wanted it done away with.

Q. Did you ever know of an operator to discipline any of the workers for illegal strikes?

A. Have I in any District, or just this District?

Q. This District, No. 28?

A. I wouldn't say without referring to my records in Washington, if I have anything on it, whether they
513 ever fined anyone in any of the coal mines for calling an illegal strike. I wouldn't know right today.

Q. In fact, if they tried it they would have another strike, wouldn't they?

A. Not necessarily so.

Q. When it was amended, the contract of 1950 in 1952, or clause 3 was amended, I believe you said the word "exclusively" was struck out; is that right?

A. In 1952 it was taken out.

Q. Yes, sir. But instead of saying "exclusively" it used the language "that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section . . ."

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A. Yes, sir.

Mr. Kramer: The same thing as in the previous one.

Q. Now, sir, both of these contracts though, sir, provide that this agreement is an integrated—just let me finish, sir.

The Court: They speak for themselves and I am going to charge the jury to the effect, and there is no use to read those, Mr. Winston.

Mr. Winston: All right, sir.

The Court: They speak for themselves.

514 Mr. Winston: Well, he went into certain interpretations, and I thought I would like to ask a few questions.

The Court: All right, you may do so if you think you should.

By Mr. Winston:

Q. You spoke of the local unions. Did you say local unions were set up as a separate unit?

A. Under the jurisdiction of the organization, but they, as I stated in my testimony, the local unions are permitted to set up their own rules and keep their own particular local union as long as they are not in conflict with the International Constitution or the terms of a national agreement.

Q. Who generally sets up a local union, the men themselves or some organizer from the District or International organization?

A. What most generally happens in the setting up of a local union, and in my experience in the Mine Workers I set up a lot of them before I came with the President—what generally happens, a group of men, if they are working for a coal operator and he doesn't have a contract, they inquire of an organizer or field representative, or in some instances the district office, if they could be members of the organization.

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515 If they find that the men who are requesting affiliation with the organization have enough members to constitute a local union, they will set up a local union for them and charter it under the International union.

Now in the event that there are not enough members there to constitute a local union and they still want to be members of the organization, they are put into a local union where they have more than 10 members.

Now it is not within the prerogative of the company or this contract to determine where, when or how local unions will be formed, because under the contract the operators have nothing to say where a local union will be established or how it will function or anything any more than we would have a right to say a coal operator should have an office in New York and one at Norton, Virginia, and one in Knoxville, Tennessee.

We don't tell them that and they don't tell us where to set up our local unions, how many we should have. We try to work that out for the economic and best interests of the membership and have carried out the contractual relationship in the best manner we know how for the organization.

Now the local unions are all chartered by the International union and Districts do not have authority to charter local unions. They are made in Washington, the headquarters.

Q. You said a group of men ask if they can, or in-
516 quired if they can be members of the organization.

The way it generally happens these men don't ask. The organizer goes in and signs them up and asks them to be members.

A. Oh, that happens on a great number of occasions, yes, sir, they go out and ask them to.

Q. The organizer is the one that generally sets it up and gets the charter?

Testimony of W. A. Boyle

A. He makes the request to the district office for the charter and the District President makes a request to the International union for a charter.

Q. And if a local is disbanded all the money and property goes back to the International.

A. It is so provided in the Constitution.

Q. Talking about the Districts. Who appoints field representatives in the District?

A. The District President.

Q. Mr. John L. Lewis appoints the District President, doesn't he, of District No. 28?

A. Of No. 28 he does. That happens to be a provisional District.

Q. And he appoints the Secretary-Treasurer?

A. In District No. 28 that is true. If you might let me make a statement, not all provisional districts are appointed officers.

517 Q. I asked you about those two officers.

A. Yes, sir.

Q. And Mr. Lewis told them where to keep the money, what bank to keep it in?

A. No.

Q. District No. 28.

A. Not to my knowledge, no.

Q. Didn't District 28 formerly keep its money in the Bank at Norton?

✓ A. I wouldn't know what bank they kept it in.

Q. And Mr. Lewis suggested or requested that they move it up to Washington?

A. I have no knowledge that he told them to move it to Washington.

Q. You did not know that?

A. No, sir.

Q. Mr. Lewis also caused a field representative of District No. 28 to be fired, hasn't he?

A. On the money, I would just like to say this, Counselor, that if there was anything wrong with the finances of that District or the monies of that district, the International Executive Board could say that certainly in the best interest of the membership that money belongs to the President of this International union and without hesitation try to do something to protect the interest of the membership. There is no question in my mind about that. Whether he did that or not, I don't know.

Q. I didn't ask you that. If you just answer what I ask you, I believe we can get along faster.

But you don't know as to whether the District kept its money, District 28—

A. I do not know where District 28 kept its money.

Q. Mr. Lewis did order Mr. Charles Minton, a field representative, to be discharged by the District?

A. It seems to me that Charley Minton was a representative of—a District representative, not an International representative, and that Mr. Condra had some discussion, not in my presence, but some discussion with respect to the activities of Mr. Minton in that District pertaining to his work, and President Lewis suggested to Mr. Condra there be his removal, and that is my understanding. I could be wrong but that is my understanding. I was not present when that took place.

Q. And the suggestion was well taken and Mr. Minton was fired, that is it, isn't it?

A. He was removed.

The Court: It is my understanding that you admitted, Mr. Kramer, didn't you, in those admissions about the Minton matter?

Mr. Kramer: No, this is the first time—

519 Mr. Winston: I believe it is.

Mr. Kramer: Yes, in these requests for admissions;

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yes, sir. Not today, but in the requests for admissions read yesterday.

The Court: He admitted that, Mr. Winston.

By Mr. Winston:

Q. Now, sir, talking about this 1952 contract again and the strike that they had after it was signed because the Wage Stabilization Board would not approve the \$1.90 increase in the daily wage. What was the daily wage of the miners under the previous contract, sir, the 1950 contract?

A. The wage for miners in 1951, counselor?

Q: The 1950 contract. The 1951 as amended.

Mr. Kramer: It is spelled out in here.

A. It is in the contract but the recognized wage in 1950 would be \$14.75.

Mr. Kramer: Page 2, your Honor, of the agreement, and page 5 of the other one.

Mr. Winston: What is that again?

The Court: \$14.75, he said.

By Mr. Winston:

Q. And then the operators and Mr. Lewis, Mr. Moses, I believe you stated, negotiated that 1952 contract and they agreed on a wage increase of \$1.90?

A. Yes, sir.

520 Q. And during that time all wage increases were subject to the approval of the Wage Stabilization Board, weren't they?

A. Not necessarily so. If they came within the limitation that did not require Board approval, all contracts were not receiving the approval of the Wage Stabilization Board, because they came within the confines of that amount that did not require approval by the Wage Stabilization Board.

There were hundreds and hundreds of wage contracts that did not receive the approval of the Board because they did not exceed that amount.

Q. An increase over a certain amount did require approval, that is correct, isn't it?

A. Yes, sir.

Q. Now Mr. Lewis and Mr. Moses both knew that would have to be approved if the Wage Stabilization Board thought that came within their jurisdiction, didn't they?

A. Well, what Mr. Lewis and Mr. Moses may have thought, I couldn't testify to, but I might say this, that there was no discussion in the negotiation between the principals to this contract with respect to having the contract approved by the Wage Stabilization Board.

The Court: Gentlemen, I know that the field for cross-examination is broad, but I do not see any necessity of examining what Mr. Lewis and Mr. Moses did. That which they did is done and then that is that, and
521 I do not think we should take up the time of the jury and the Court on matters of that kind.

Mr. Winston: All right, sir. Just a couple of other questions.

By Mr. Winston:

Q. This letter that was mentioned from Mr. Lewis to Mr. Moses, was that published in the United Mine Workers Journal, the one about the sheep's heart?

A. The reply of President Lewis to Mr. Moses?

Q. Yes, sir.

A. Yes, sir, I am sure—I am satisfied it was, it was released. The letter was released.

Q. And put in the newspapers, wasn't it?

A. I am satisfied it was, sir.

Q. And Mr. Lewis knew that all the mine workers would read that, didn't he?

A. Presumably so. Anyone that wanted to read it I guess read it.

Q. And at that time Mr. Lewis of course was anxious for the Wage Stabilization Board to approve that wage increase?

A. We all were, yes, sir, including President Lewis. But I want to say this, counselor—

Q. Yes, sir.

A. — that President Lewis never at any time, and that letter so states, took the position that he had sent those men out or that the men had requested or counseled with him whether they should be in or out. When they did not find that pay in their pay envelopes they went out, no one could hold them in.

Q. And he said in the letter the men will go to work when you honor the contract; didn't he also say that?

A. Whatever the letter said: I agree to what is in the letter.

Q. As a matter of fact, before Mr. Lewis saw Mr. Truman in that meeting he did not send any telegram or letter written to the men to get back to work?

A. No. We were all hoping the Board was going to approve the \$1.90.

Q. Until Mr. Truman told you to do so he did not take any such effort to get them back to work?

A. There was more than that. There was more than that to it. The operators told the President of the United States in the presence of Mr. Lewis that they would now pay \$1.50 and hold in escrow 40c subject to the approval of the Wage Stabilization Board which put a different color on the complexion of the picture.

Now the men having an assurance from the coal operators that 40c will be held and assurance that if the Board finds they will approve that 40c which had not been approved in the first instance, and on approval it would be retroactive until October 1, that threw a different light upon the men's thinking about returning to work.

Q. But, of course, a lot of the operators were willing to pay the full \$1.90 increase, weren't they?

A. I heard some testimony to that but I don't know that they were.

Mr. Winston: I believe that is all.

Redirect Examination, by Mr. Kramer.

Q. This United Mine Workers Journal, is that the name of that publication that you were talking about a minute ago?

A. That is our publication.

Q. Is it published monthly, weekly or daily, or how?

A. It is twice a month.

Q. And dates published, please?

A. 15th and 1st.

Mr. Kramer: Come around.

(Witness excused.)

ROMAN JONES,

called as a witness by and on behalf of the cross-defendant, after having been first duly sworn, was examined and testified as follows:

524 **Direct Examination, by Mr. Rayson.**

Q. Would you state your name, sir?

A. Roman Jones.

Q. Where do you live, Mr. Jones?

A. I live at Pennington Gap, Route 1.

Q. Is that in Lee County, Virginia?

A. Yes.

Q. Near St. Charles?

A. Yes.

Q. Mr. Jones, what is your occupation?

A. My work is mining before I retired.

Q. You are retired now?

A. Yes, sir.

Q. What age man are you?

A. Sixty years old.

Q. Mr. Jones, when you were active as a miner were you employed by the Benedict Coal Corporation?

A. I was.

Q. How long were you employed by that company?

A. I was employed by them about 19 years with exception of—well, I worked for them about 19 years with the exception of the time I was sick and the times I was cut off.

Q. When did you leave their employment?

A. I left their employment the 31st day of July, 1953.

525 Q. Did Benedict Coal Corporation close down at that time, Mr. Jones?

A. Yes, sir.

Q. As far as you know it hasn't operated since then, has it?

A. That's right. As far as I know they have not operated since then.

Q. Were you a member of your local union of the United Mine Workers of America while employed there?

A. Yes, sir.

Q. Did you hold any office in that local organization?

A. Yes, sir. I was president of the local union from 1948 until 1951.

Q. Now, Mr. Jones, it has been said there were a number of work stoppages which occurred there at the Benedict mine from some time in 1950 to May of 1953, and I want to talk to you about those supposed work stoppages.

Do you have any recollection of the work stoppage that occurred on April 14 and April 17, 1950, over a seniority dispute?

A. Yes, sir.

Q. What is your recollection of that matter, Mr. Jones?

A. Well, that seniority, that was transferring men up to No. 9 mines and they shut down part of No. 7 mine and

526 the company wanted to pick their men and take up there and we wanted them to take them as to seniority.

Q. And did the company take the older men?

A. Yes, after we went back to work they did.

Q. Did they take the older men at first, when they first started to close down No. 7?

A. No, they wanted to pick their men.

Q. What did you do when they wanted to pick their men later?

A. We walked off.

Q. And before you walked off did you get any instructions from any representative of District No. 28 of the United Mine Workers to walk off?

A. No, sir.

Q. After you walked off did anybody from the District come down and talk to you about that?

A. I suppose the company called Mr. Seroggs.

Q. Who is Mr. Seroggs?

A. E. L.

Q. Who is he, Mr. Jones, what was his position at that time?

A. He was field worker.

Q. He was field worker for the District?

A. That's right.

Q. Did Mr. Seroggs come down?

A. Mr. Seroggs came down, I think, the best I recollect.

527 Q. Did you sit in on a meeting where Mr. Seroggs was present?

A. I think so.

Q. Where was that meeting?

A. One in the office of Benedict Coal Corporation.

Q. As a result of that meeting did you work out some way that you would go back to work?

A. Yes, sir.

Q. Did he take all the old men back?

A. Mr. Darst, after we had discussed it there for some time, he said, "Let me go in here and see if I can get in contact with Knoxville," and he went in there and he come back and said, I believe he said, "We can work out something."

And to my best recollection they pulled part of the steel out of No. 7 mine and they laid some sections back up where they had pulled the steel out of it and put all the men back to work at that particular time.

Q. After that you went back to work, is that right?

A. How is that?

Q. I say, and after that you went back to work, is that right?

A. That's right.

Q. You did not live in the Benedict camp during the summer of 1950, did you?

A. No, sir.

528 Q. Do you remember though during that summer and early fall a water shortage there at the camp?

A. I do.

Q. Do you remember a work stoppage over that water shortage?

A. Yes, sir, I do.

Q. Were you president of the local at that time?

A. Absolutely.

Q. Do you know whether or not anybody, Mr. Scroggs or anybody from the District office told you "You ought to take matters in your own hands, men, come out on strike." Did anybody say anything like that to you?

A. No, sir.

Q. Were you around there when this work stoppage was going on?

A. I was on, I believe we were out three days, Wednes-

day, Thursday and Friday, and I went back up there to work on Thursday after the men there in the camp come off on Wednesday on account of they said they had no water to take in the mine with them and none to drink and none at home to cook with, and on Thursday morning when I started back off I told Mr. Fortner, I said, "I will not be back up here no more until Monday." I said, "This makes two days that I have come up here and not to work, and I am going squirrel hunting," and I went squirrel hunting on Friday.

529 Q. Did you resume work on the following Monday?

A. Yes, sir. They went back to work on Monday.

Q. You mentioned Fortner. Who is Fortner?

A. Bob Fortner.

Q. Who is Bob Fortner?

A. He was superintendent up at the No. 9 mine at that time.

Q. Is he superintendent over all the seams or just one of them?

A. Well, I believe he was superintendent over No. 9 and No. 10.

Q. In other words his jurisdiction extended over more than one of the seams up there?

A. No. 9 and No. 10, both, I believe.

Q. Did anybody from the District tell you or tell any of the men they should not work there because of the water shortage, Mr. Jones?

A. No, sir.

Q. Now in January of 1951, do you remember a work stoppage over a man named Collingsworth?

A. No, sir; I don't recollect anything about that.

Q. Were you working there at that time?

A. I might have been working there at the time but any work stoppage came over him, I don't recollect it.

Q. Now, which seam were you working in, do you know?

Testimony of Roman Jones

530 A. What year?

Q. If you were working there at that time, do you know?

A. What year?

Q. 1951, January. What seam would you have been working on, what mine would you have been in?

A. In No. 9.

Q. Do you know which mine Collingsworth was in at that time?

A. He was in No. 11.

Q. He was not in yours?

A. No, he wasn't in my mine where I worked.

Q. All right, sir. Now, in the summer of 1951 it is said that there was a work stoppage over vacation pay. Do you remember that matter?

A. Yes, sir.

Q. First, I am going to ask you, were you president of the local union at that time?

A. In what year?

Q. That was in July, 1951.

A. No, I was not president that time.

Q. Did you attend any meetings with anybody over that matter, Mr. Darst or with any committee, anything like that?

A. I don't recall it if I did.

Q. In other words, you did not meet with anybody
531 from Benedict Coal Corporation or from the District or even from your own local at that time?

A. No.

Q. All right, sir. Now, it is said there was a work stoppage in the fall of 1951 over the action of the company in cutting off credit to the men that were on the panel. Do you have any recollection of the work stoppage over that matter?

A. What time in the fall did that—

Testimony of Roman Jones

Q. That was in October. It is said October 2nd through the 8th.

A. I wouldn't be positive about that. I can't recollect all of those work stoppage back that far.

Q. Were you an officer of the local union at that time in October or 1951?

A. No, sir.

Q. Do you recall a man by the name of Earnest Tabor?

A. Yes, sir, I know Earnest Tabor.

Q. Do you have any recollection of his having been discharged by the Benedict Coal Corporation?

A. No, I don't know nothing about that.

Q. You were not an officer of the local union at that time?

A. No, sir.

Q. Now, were you working in August of 1952 at 532 the Benedict Coal Corporation, Mr. Jones?

A. No. Let's see, in 1952? I was cut off after vacation pay and never went to work no more until the 16th day of September.

Q. I will ask you if you were employed there or have any recollection of the work stoppage involving a man by the name of M. M. Campbell?

A. No, sir, I don't know nothing about Campbell.

Q. Is it your testimony that you were not working at that time?

A. No, I wasn't working at that time.

Q. And do you recall a matter involving a Jap Anders and Mel Roark who were involved in a dispute?

A. No, sir, I don't.

Q. You were not working at that time?

A. I heard them talking about that up there but I don't know anything about that. Just hear some of the men talking. I don't know nothing about it.

Q. Were you working during the year 1953?

Testimony of Roman Jones

A. I was working up until the 31st day of July, 1953, when they quit.

Q. How long had you been working there at that particular time since you had last been laid off?

A. Been working from the 16th day of September, 1952, up until the 31st day of July, 1953.

533 Q. Now, do you recall a work stoppage which is said to have happened on the 28th day of May, 1953?

A. I do.

Q. I would like you to explain to the Court and jury just what the circumstances of that stoppage were.

A. Dana Muncey was president at that time and he come around and told us that the company had never notified him they had sent the welfare in—royalty in to welfare fund, and they were supposed to notify them before the 18th, and we left.

Q. After Dana Muncey told you that you left, is that right?

A. That's right.

Q. Where did you go?

A. I went home.

Q. Did you have an occasion to come back to the mine the next day?

A. I come back to the mine the next—no. The next day, let's see—I believe we had a call meeting the next day.

Q. What happened at that call meeting?

A. They voted to return to work.

Q. Well, did you go to work the next day?

A. I went to work the next day and got up there and the work sign was turned down. It was up that evening.

534 Q. Did you talk to Mr. Darst or anybody about that, Mr. Fortner, any of those people about that work stoppage? I mean, after you had voted to return to work and you came back and you found the work sign was turned off, did you talk to anybody about it?

Testimony of Roman Jones

A. That day?

Q. Yes, sir.

A. No, sir.

Q. What did you do that day, Mr. Jones?

A. I bought a couple of houses from the company and went back home and got a wrecker bar and a hammer and went up and started tearing one of them down and moved it down to where I built my own home.

Q. How close was that camp to the mines?

A. It is pretty close.

Q. Did you see anybody picketing around there that day?

A. No, sir, I never.

Q. Did you see any men standing around?

A. I saw some men there at the filling station as I went by the filling station.

Q. Were they intimidating anyone or keeping anybody from going to work?

A. I never saw them do that myself.

Q. How many men were there?

535 A. Oh, there might have been seven or eight when I passed.

Q. What time of day was that?

A. Just as soon as I found out there wasn't no work. As soon as I could go back down a half mile below there where I lived at that time and get the wrecker bar and hammer and back up there. I passed there.

Q. Now, Mr. Jones, in your experience there as a member of that local union and as an officer in the local union, have you ever known of any District officer to come down and advise you people to take matters in your own hands or to go out on one of these local work stoppages?

A. No, sir.

Q. Have you ever known them to come down after you got in those things, after you went out on those work stoppages or strikes?

Testimony of Roman Jones

A. Yes, sir, they come down and tried to get us to go back to work when they found it out.

Mr. Rayson: You may ask him.

Cross-Examination, by Mr. Milligan.

Q. You first referred to a so-called work stoppage. Do you call it a work stoppage or do you call it strikes?

A. Well, I don't know what you call it.

Q. I am asking you what you call it?

536 A. Well, I call it work stoppage.

Q. Work stoppage. Did you start calling it work stoppage after you came here to court or have you been calling it that way all the time?

A. Well, that is the way we always call it.

Q. You always call it that?

A. Yes.

Q. Mr. Jones, your first work stoppage—I will call it work stoppage so we will all have the same definition—which was on April 14th and 17th, wasn't it? That is what you said the first one was you referred to in 1950, is that right?

A. That is right.

Q. And what did you say you did as president of the local?

A. 1950?

Q. Yes, sir.

A. Well, we went back home.

Q. Did you have a meeting?

A. We went down there and they wanted to shut part of No. 7 mine down, and they wanted to cut off the men that they wanted to cut off and we wanted them to take them by seniority.

Q. You said they wanted to pick the men from this seam they were closing and take them to another seam?

537 A. Take them to No. 9.

Q. And what did you want done?

Testimony of Roman Jones

A. We wanted them to take them by seniority, seniority rights, the oldest men first, and they was taking them just to suit themselves.

Q. You, of course, as president of the union were familiar with the contract provisions for arbitration, weren't you?

A. Well——

Q. Not too familiar with that?

A. Well, I wasn't too familiar with it.

Q. You never used it, did you?

A. Used the contract.

Q. Never used the arbitration method of settling disputes, did you?

A. Sometimes.

Q. You did not on this occasion, did you?

A. No.

Q. Just walked off?

A. That's right.

Q. Did you see Mr. Scroggs down there?

A. That day?

Q. Yes, sir.

A. No, sir.

Q. When did he come into the picture?

538 A. Well, they called him, I reckon.

Q. I didn't ask you that. I asked you when he came in.

A. Well, he came in when they called him, and he called me then and told me to get a committee together and we go up to the office, had an appointment with them at a certain time, and we went up.

Q. Did he ever give you any instructions as to the method of handling these matters by arbitration or negotiation?

A. He always told us to take the strike, to take the grievance to the Board.

Q. Did you do that?

Testimony of Roman Jones

A. No, sir, we never done it.

Q. Just did not pay any attention to Scroggs?

A. No, sir.

Q. He was the one you were supposed to pay attention to, wasn't he?

A. Well, we paid attention to him when we thought we were going to get a fair deal.

Q. In other words, sometimes you did not think you were going to get a fair deal out of Scroggs, is that right?

A. I didn't mean to say we won't get a fair deal out of Scroggs.

Q. Didn't you say just a minute ago—

Mr. Kramer: Let him answer.

539 Q. Go ahead, then I will ask you.

A. Sometimes the Board, they board a case and it would be a week or two before you would get it before the Board, and so the men up there, why lots of times they just struck over them.

Q. Just did not pay any attention to Scroggs?

A. We did not pay much attention to him when we were on strike.

Q. Now you spoke about this water shortage. There was a water shortage in the camp, of course.

A. Yes.

Q. The people who did not live in the camp, they had an adequate water supply, didn't they?

A. The people didn't live in the camp—I take my own water from home.

Q. You had an adequate water supply?

A. I had water, yes; I had water.

Q. And the water supply did not affect you?

A. No, it never affected me.

Q. And there were a number of other employees in the same circumstance that you were, isn't that true?

A. Well, I guess there were.

Testimony of Roman Jones

Q. Notwithstanding the fact that the company was endeavoring to get water you and those others who lived out of the camp went on strike, didn't you?

540 A. We did not want to work and the other men out of water.

Q. Now, did you talk to Seroggs about that or just go ahead and pay no attention to him?

A. They called Seroggs—I suppose the company called Seroggs.

Q. He came down?

A. He came down on Saturday and they had a meeting and voted to return to work on Monday morning.

Q. That was during the water shortage, wasn't it?

A. I don't know whether they had the water shortage cleared up. I don't recall whether they had the water shortage cleared up.

Q. Now that is what you were going to have the meeting about, wasn't it, about the water shortage?

A. How is that?

Q. That is what you were fussing about, arguing about, the lack of water, that was why you went on strike although you had plenty of water, and lots of other people working for the mine had plenty of water, you went on strike because of the fact those that lived at the camp did not have water, isn't that right?

A. That's right.

Q. Now I believe you said you do not remember anything about a trouble that arose over a man named
541 Collingsworth, or vacation pay, or credit, or a man named Tabor; you don't remember anything about those?

A. No, I don't remember anything about them.

Q. And anything about Campbell?

A. No.

Q. You do remember something, however, about this

Testimony of Roman Jones

work stoppage or strike that arose on May 18, 1953 at the time you had made inquiry as to whether or not notice had been given the welfare fund had been paid.

A. The president, Dana Muncey, who was president of our local union at that time and he said he had not been notified the welfare payment had been sent in and they were supposed to notify him before the 18th.

Q. Was it before the 18th or on the 18th or on or before the 18th, which was it?

A. On or about the 18th.

Q. I see. Now, what time did you strike on the 18th?

A. It was that morning.

Q. Well, he had all day to notify them, didn't he; you didn't even give him a chance to notify him.

A. We went on strike or work stoppage.

Q. Well, Mr. Scroggs suggested you do that?

A. No, he never suggested we do that.

Q. He did not ask you anything about it?

A. No.

542 Q. You just figured they were not going to notify the proper authorities that they had made this payment and went on, early that morning, went on this strike, didn't wait to find out, did you? What time did you go on strike that day?

A. That morning. I told you when work time comes.

Q. What is work time? You see, I don't know.

A. Seven o'clock that is when we were supposed to work.

Q. You went off at 7 o'clock notwithstanding the fact on or before the 18th he was to give this notice.

A. Yes.

Mr. Milligan: I believe you may come down.

(Witness excused.)

*Testimony of Homer W. Gibson***HOMER W. GIBSON,**

called as a witness by and on behalf of the cross-defendants, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Hardin.

Q. You are Mr. Homer W. Gibson?

A. Yes, sir.

Q. How old are you?

A. Sixty years old.

Q. Where do you live?

A. Benedict, St. Charles.

543 Q. How long have you lived there?

A. I have been there the last 20 years.

Q. Where do you work?

A. I work for the Benvir Coal Company. They changed the——

Q. Was that formerly the Benedict Coal Corporation?

A. Yes, sir.

Q. How many years have you worked for the Benedict Coal Corporation or its successor?

A. Well, the company changed over. When they started back the last time they changed over to the Benvir Coal Company. I would say I worked 17 years for the Benedict Company.

Q. When did they change it over?

A. In August.

Q. Of what year?

A. This last year.

Q. 1955?

A. Yes.

Q. How long have you been a coal miner?

A. Turned in 48 years.

Q. Forty-eight years. Are you a married man?

Testimony of Homer W. Gibson

A. Yes, sir.

Q. Have a family?

A. Yes, sir.

544 Q. How many children?

A. Six children.

Mr. Milligan: Your Honor, we don't resist that information but I do not see where it is so material.

By Mr. Hardin:

Q. When did you quit working for the Benedict Coal Corporation?

A. The year they closed down, 1943, July 31.

Q. You mean 1953?

A. Yes, 1953, July 31st.

Q. Do you remember about some trouble and stopping work in April, 1950, over seniority?

A. Well, I believe that, I don't remember whether they had any work stoppage over it or not, but the company did not want to apply to the seniority, and it seems like they had to force them to apply by it and they finally agreed to accept it.

Q. They worked it out?

A. Yes.

Q. Now, do you remember about the water trouble in 1950, September?

A. That was up at the No. 9 mine, up on the mountain, where they started up there and the No. 9 struck over that. No. 5 hadn't yet started producing coal.

Q. You are talking about seniority?

545 A. Yes, sir.

Q. Now then, getting away from seniority and coming over to the water situation in the camp, do you know anything about that?

A. Yes, sir. I do know that we had no water up there, scarcely any at all—sometimes we didn't have any at all.

Q. Did you live in the camp or outside?

Testimony of Homer W. Gibson

A. I lived in the camp.

Q. You lived in the camp?

A. Yes, sir.

Q. What about the water, when was it on or when was it off?

A. Sometimes it would be probably two or three weeks wouldn't be on at all.

Q. How long had that situation been going on before the work stoppage?

A. It had been going on a right smart.

Q. What had been done about it, if anything?

A. Didn't seem like anything had been done.

Q. Had any effort been made on the part of the local committee to do anything with it?

A. I understand the committee took it up with Mr. Darst.

Q. Had the company done anything?

A. No, sir.

546 Q. What finally happened then on or about September 27, 1950?

A. Is that the water——

Q. Yes.

A. Well, they finally went to work and kind of put it in there, down in camp there for a while and sometimes it would be off, maybe two or three days or a week and it would go off again.

Q. Did you have any water there to cook with?

A. No, sir. Didn't have any to take to work with us.

Q. Did you personally or not talk to Mr. Guy B. Darst about the water situation?

A. Well, there was a bunch of them that did.

Q. Were you present?

A. I heard them ask him about it.

Q. What did he say?

A. Well, he seemed like he kind of got mad about it and

Testimony of Homer W. Gibson

said he had plenty of water at his house. Didn't seem like he was much interested in our water in the camp.

Q. He did not live in the camp?

A. No, sir.

Q. Now did they later bring in some kind of pipe and you went back to work?

A. Later they got the water started better than what it had been.

547. Q. What caused you to go back to work?

A. Well, he agreed to have it fixed.

Q. Now did you know a foreman by the name of Collingsworth?

A. Jim Collingsworth?

Q. Yes, sir.

A. Yes, sir.

Q. Now how long have you known him?

A. Ever since I have been there.

Q. Did you have any difficulty over him in January, 1951?

A. Sure did.

Q. What was it; tell the Court and jury, please, sir.

A. Well, they struck over him, the men did over him mistreating them on the job.

Q. How did he mistreat them?

A. He talked mean to them like a bunch of convicts, or something like that, and cursed them; all such stuff as that.

Q. Was that matter taken up with Mr. Darst?

A. I suppose it was. Didn't seem like it helped any.

Q. For how long a period had that trouble been brewing before the stoppage?

A. It had been brewing ever since Collingsworth had been a boss. He couldn't get along with his men.

548. Q. How long had he been a boss?

A. I would say he had been a boss there probably 10 or 12 years, probably longer.

Testimony of Homer W. Gibson

Q. Did the company or not agree to do something with his position a little later on after the stoppage?

A. I believe, I am pretty sure they agreed to remove him but never did.

Q. Now, then, do you remember anything about some vacation pay in July of 1951?

A. Yes, sir.

Q. What happened there, briefly?

A. Well, the vacation pay come due on this last pay day in June. The company claimed they did not have the money to pay it off. Well, they agreed—they asked for 30 days longer to pay it in, and then that 30 days run out and they still did not have the money.

Q. When were they supposed to pay it?

A. In 30 days. The time we give them was 30 days, and went back to work and agreed they could have 30 days.

Q. When were they supposed to pay it?

A. The 30th of June. The last pay day in June.

Q. Then you extended it, I believe, 30 days?

A. Yes.

Q. On one or two different extensions?

A. Just the 30 days extension, and the 30 days was
549 up and still they did not pay it.

Q. And what did they say or do about it?

A. Well, the men struck over it, and they agreed to pay a little along at a time.

Q. Was that after the men walked out?

A. That was after the men walked out and after their 30 days run out.

Q. Along about July 30th and 31st, 1951?

A. That's right. They wanted to pay it that way. The company did. The men stayed out until they got their vacation.

Q. Did they work it out individually with the men affected?

Testimony of Homer W. Gibson

A. Yes, sir.

Q. Now, then, do you remember any trouble about stopping credit a little later in October of 1951?

A. Yes, sir, stopped their credit.

Q. Did they have a panel at that time for the men off from work?

A. I am pretty sure they did have, yes.

Q. What do you know about the credit, just tell the Court and jury?

A. They stopped us from any credit for us and finally they worked it with the local, the local would stand for it but they would give us some scrip to live on.

550 Q. The local union stood for it?

A. Yes, sir.

Q. How long was the work stoppage at that time, do you remember?

A. It was not over two or three days of it. A very short time.

Q. Did you know two workers up there, miners by the name of Anders and Roark?

A. Yes, sir.

Q. What happened to them in August, early part of August, 1952, if anything?

A. Well, they were discharged from the job. They were track men and they were dropping a motor down out of the way and it got away from them and run off the bank, and Bob Fortner fired them over it, and they were not classified as motor men.

Q. How long have you known the two gentlemen, approximately?

A. I have known them possibly 17 or 18 years. Most of the time I have been there.

Q. What kind of men were they? I am referring to being careless or careful in their work?

A. They were safe workers in their work, safe working men.

Testimony of Homer W. Gibson

Q. Were they not motor men, track men?

551 A. Track men, not no motor men.

Q. And how long had they been with the mine, approximately, with the company?

A. Well, they had been there almost as long as I have. Yes, sir, they have been there for a long time.

Q. What happened when they fired them or laid them off?

A. Let me see.

Q. Did you all stop working then, or do you remember?

A. I don't just remember.

Q. Were they put back on then?

A. Yes.

Q. Worked it out?

A. Yes.

Q. Mr. Gibson, do you know a man by the name of M. M. Campbell?

A. Yes, sir.

Q. Did he come there to the mine, start some work in 1951?

A. Yes, sir.

Q. What developed as a result of his coming there?

A. You mean what—

Q. What did he do? What did he do, first of all, about his men?

A. About his job, about his men?

552 Q. Yes, sir.

A. Well, he brought a bunch of men with him, picked up a few around St. Charles there. Well, some of the men joined the local and he cut them off over it.

Q. He cut them off?

A. Yes.

Q. What did he do later?

A. He stayed around a few days and he left.

Q. How long did he stay gone?

Testimony of Homer W. Gibson

A. He probably stayed gone two or three weeks.

Q. Did he come back?

A. He come back, yes, sir.

Q. Was that in 1951 or do you recall, 1952, when he left?

A. I believe 1952.

Q. Then when he came back what did he do?

A. He went to hiring other men and wouldn't work the men he did have.

Q. Different men?

A. Yes.

Q. What happened?

A. Well, the company was supposed to get shed of him. Claimed he was causing the company too much trouble.

Q. The company was going to get shed of him?

A. Did get shed of him, I reckon.

553 Q. Did they stop any work that you know of on February 7 and 8, 1952?

A. Not that I know of.

Q. On account of that?

A. No.

Q. Is there anything else you know about the Campbell operation?

A. No.

Q. Now, then, did you ever hear any conversation or talk between Mr. Campbell and Mr. Guy B. Darst here?

A. You mean the conversation themselves?

Q. Yes, sir, between them?

A. No, sir.

Q. Did you know Mr. Swisher?

A. Yes, sir.

Q. He came there in 1953?

A. Yes, sir.

Q. Now what did he do there?

A. Well, he was operating that stripping outfit up there.

Testimony of Homer W. Gibson

Q. How close was that mine to opening No. 7?

A. It is the first mine above No. 9. First place above No. 9.

Q. What did they do with the other mines that had been in operation there before that?

554 A. No. 9 mine?

Q. Yes.

A. Shut down.

Q. How did he operate, from the top of the ground or deep mining?

A. Top of the ground.

Q. And did he hire local men or bring men with him; what did he do?

A. He brought men with him.

Q. Do you know anything about any difficulties regarding those men?

A. No.

Q. Their joining up or anything?

A. No.

Q. Now then, do you remember any question coming up about the royalty in May, 1953?

A. Yes, sir.

Q. Just what happened?

A. They failed to pay the royalty up there.

Q. How did you learn that, sir? Who told you about it, if you remember?

A. Well, I think it was the president of the local that probably told us there wasn't no royalty paid.

Q. Who was the president at that time?

A. Dana Muncey was president at that time.

555 Q. Were you an officer of the union?

A. I was on the mine committee.

Q. When were you on the mine committee?

A. 1952.

Q. Had the question of paying the royalty come up be-

Testimony of Homer W. Gibson

fore May 18, 1953, or not paying them; had that question been brought to your attention and the attention of the men?

A. I just don't remember whether it had or not.

Q. Do you know whether or not they had been paying it in the past or were they behind?

A. No, sir.

Q. What happened on May 18 when you learned the royalty was not paid?

A. They quit.

Q. You quit too, didn't you?

A. Sure.

Q. Where did you go right after you did not go to work on May 18 at 7 o'clock in the morning; where did you go to then?

A. Went back home.

Q. And did you go by the filling station there?

A. Yes, sir.

Q. Did you stop at the filling station, or do you remember?

A. No, I went on home.

556 Q. I will ask you whether or not that filling station is on the way to the operation of the Big Mountain Coal Company?

A. Right beside the road.

Q. Did you see any men there that morning?

A. We seen the no work sign up.

Q. I mean at the filling station. Did you see anybody at the filling station?

A. No.

Q. Anything going on there, any picket line?

A. No.

Q. And you went that same road to go home, as I understand it?

A. Yes.

Testimony of Homer W. Gibson

Q. Now then, was ~~there~~ a no work sign up on the 18th—a work sign at that time?

A. Yes, there was a work sign that evening.

Q. What happened to that work sign?

A. Well, then we went to—we all knowed they were working for the work sign was up that evening.

Q. The evening of the 18th?

A. That's right.

Q. Then what happened next?

A. That next morning when we started to work—

Q. Did you go back to work the next morning, or
557 start to work?

A. Yes, sir. Went back to work but they changed on us, said no work.

Q. Said no work?

A. And we all sat down there.

Q. Do you know Bob Fortner?

A. Yes, sir.

Q. Did you see him that morning of the 19th?

A. Yes.

Q. What was his capacity or position with the Benedict Coal Corporation?

A. He was general mine foreman.

Q. What?

A. He was general mine foreman.

Q. What if anything did he say to you that morning of the 19th?

A. Well, we were all gathered there. We noticed about the work sign being changed, and Mr. Harye Edwards asked him, "Bob, what's the matter here?" and Bob, he come out with a big oath and said, "You fellows been on a strike and now we struck."

Q. He said that you fellows had been on a strike and now they struck?

A. That's right.

Testimony of Homer W. Gibson

Q. When did you get back to work? When did they
558 let you go back to work, about how many days?

A. They held us off about two weeks before they let
us go back to work.

Q. Do you know Mr. Scroggs?

A. I have seen him, yes. I know him.

Q. Did he at any time—I will ask you whether or not
he ever told you workers or mine union officials to go on
a strike or work stoppage?

A. He always advised us to stay at work, go back to
work. If we were out he would come down and advise
us to go back to work.

Mr. Hardin: You may ask him.

Cross-Examination, by Mr. Milligan.

Q. Mr. Gibson, you say you are a member of the mine
committee?

A. No. I was at that time, 1952. I am not now.

Q. I am talking about at that time.

A. Yes.

Q. How long were you on the mine committee?

A. I was on, just on that about probably 6 or 8 months,
I changed over to another mine.

Q. Who was on the committee with you?

A. Grant Mullins and Jim Scott.

Q. Grant Mullins and Jim Scott?

559 A. That's right.

Q. That was in the year 1952?

A. Yes.

Q. And that was the time Mr. Campbell was over there
and you had two strikes during the Campbell period?

A. We didn't have nary one during Campbell's period.

Q. No strike at all?

A. Not over him.

Q. Are you sure about that?

Testimony of Homer W. Gibson

A. I am sure about it, yes.

Q. If you had had them you would have known about them, being on the committee?

A. Why sure.

Q. And you say you were off about two weeks on the occasion of this—

A. The company had us off about that long when they took the work sign down on us. They had us off.

Q. That started on what day, Mr. Gibson?

A. Well, I just don't remember what day.

Q. To refresh your recollection wasn't it on the 18th of May, do you remember that?

A. It might have been.

Q. Why did you go out?

A. Why did—

Q. Why did you go on a strike?

560 A. It was over the welfare—I mean the royalties and the vacation.

Q. Royalties and vacation. Was it over both of them?

A. That was the only strike there was.

Q. You say over the vacation and royalty, that was the May 18th strike, is that right? I don't want to confuse you. I want to know what your answer is.

A. The strike was over the vacation and the royalty.

Q. And this was one strike over both of those things?

A. No, it was different times.

Q. I am talking about May 18—

Mr. Kramer: What year?

Q. 1953. Which was it?

A. This was over the royalty, the first strike we had.

Q. That was over the royalty?

A. Yes.

Q. When did you have the strike over the vacation pay then, if that was first; you did have one after that?

A. We had one 30 days after it was due, after they failed to pay it on the 30th day like they agreed to,

Testimony of Homer W. Gibson

Q. I know. I am not talking about the 30 days but you said it was after the strike over the royalty, the strike of May 18th, 1953, was the first strike you say they had.

A. Yes, sir.

Q. And the vacation pay strike was later than that,
561 is that right?

A. Later than that.

Q. How did you happen to go on strike over the royalty; what was the reason?

A. It hadn't been sent in.

Q. How do you know it hadn't?

A. Well, we knowed pretty well that it hadn't.

Q. Well, was it required to be sent in by any definite specified date?

A. Yes, sir, be sent in by the 18th of each month.

Q. And the 18th you went out.

A. Yes, but it hadn't been sent in in several months.

Q. What time of day did you go out on the 18th, morning or afternoon?

A. It was morning, of course.

Q. Do you know the hour?

A. No, I don't know the hour.

Q. What time did work start, supposed to start, on that day?

A. Seven o'clock.

Q. Did you go over there and report for work and then quit, or how did you handle that? I am not familiar with those things and I would like to know.

A. Well, you really don't go out to work —

Q. I beg your pardon?

362 A. Sometimes they don't go out to work and sometimes they go to the mines.

Q. I am talking about on May 18, 1953. What did you do that day, that is the day you say you struck because of the welfare?

Testimony of Homer W. Gibson

A. I don't believe they reported out to work.

Q. You were asked if you knew this man Ura Swisher, this man doing strip mining.

A. Yes. I just knowed him when I seen him.

Q. This strike have anything to do with his activities?

A. No, sir.

Q. Nothing at all?

A. No.

Q. Was not connected with this at all?

A. No.

Q. Never had any strikes in connection with him?

A. No.

Q. Did you ever picket his workmen?

A. No, sir.

Q. Did you ever know of any member of the Benedict local picketing his workers?

A. No, sir, I never even heard this mentioned on the job up there.

Q. You did know there was such a man up there?

A. I knowed there was a man up there by that name.

563 Q. Had no connection?

A. Had nothing to do with it.

Q. The only two strikes you remember much about is one over vacation pay, that one was later than May 18, 1953, and the one of May 18, 1953 to get the welfare payment?

A. That is all I can say.

Mr. Milligan: Stand aside.

Mr. Hardin: Come down.

(Witness excused.)

Testimony of Harve Edwards

HARVE EDWARDS,

called as a witness by and on behalf of the cross-defendant, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Rayson.

Q. Mr. Edwards, state your name.

A. Harve Edwards.

Q. What is your age?

A. Sixty-four, will be my next birthday. Sixty-three now.

Q. Are you working?

A. Yes, sir.

Q. Where do you work?

A. No. 5 Benedict, Benvir.

Q. That is known as Benvir, isn't it?

564 A. Yes.

Q. How long have you worked there in No. 5 and in those other mines up there?

A. You mean the whole—

Q. Yes.

A. Well, I went there in 1919, 6th day of December.

Q. You went there the 6th day of December, 1919?

A. Yes, sir.

Q. Worked there all the time since?

A. Been in the camp ever since.

Q. You live down in the camp?

A. Yes, sir.

Q. Are you a member of the Benedict local?

A. Yes, sir.

Q. All right, Mr. Edwards, you can hear me all right, can you?

A. Yes, sir.

Q. Mr. Edwards, there has been some talk around here about a work stoppage at the Benedict mine in 1950, in

Testimony of Harre Edwards

April, 1950, over a seniority dispute. Do you have any recollection of that matter?

A. Well, I don't know as I do. There has been so much up there I never paid much attention to it.

Q. Are you an officer of the local?

A. No, never been.

565 Q. I am going to skip down this list of things but

I want to talk to you about a matter that is supposed to have happened in May, 1953, involving the welfare fund.

Do you have any recollection of a work stoppage over the welfare fund in May, 1953?

A. Welfare?

Q. Yes, sir.

Mr. Milligan: We except to the leading questions.

Mr. Rayson: I think they have identified these strikes on the board by name and it is rather difficult to pick a date out of the air and ask him.

The Court: I believe though, Mr. Rayson, that it would be more proper to ask him about that strike and what caused it.

By Mr. Rayson:

Q. In 1953, May of that year, do you remember any—

A. They stopped over it.

Q. Now, did you remember having a meeting of the local union over that matter?

A. Might have had one, but I didn't go.

Q. You did not go?

A. No.

Q. Do you know if you went back to work any time during that matter and you found that the work light had been turned off?

566 A. We started to work one morning, to go to work the next morning and the work sign was off. And then I saw Mr. Bob Fortner and I said, "Bob, what is the matter?"

Testimony of Ellis Lynn

Q. Who is Bob Fortner?

A. Yes, Bob Fortner.

Q. Who is Bob Fortner?

A. Operating general superintendent or mine foreman. I asked him what the matter and he said, "You say you are on strike," and he said, "Now Benedict is struck."

Q. That was the general foreman?

A. And he went on down the road and I went to the house.

Q. You say you had a little trouble down there from time to time. Have you ever known anybody from the District to come down and tell you to go out on these?

A. No, not me.

Q. Have you ever known of District people to come down there and talk to you when you went out on strike?

A. Yes. I have had them come down and tell us to get back to work.

Q. Who would come down?

A. Seroggs, Bud Clark, be a whole lot of them.

Q. Tell you to get back to work?

A. Yes.

Mr. Rayson: You may ask him.

567 Mr. Winston: Stand aside.

(Witness excused.)

ELLIS LYNN,

called as a witness by and on behalf of the cross-defendants, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Rayson.

Q. Please state your name.

A. Ellis Lynn.

Q. Mr. Lynn, where do you live?

Testimony of Ellis Lynn

Q. I live at Benedict.

Q. In the camp there?

A. Yes, sir.

Q. Are you a coal miner?

A. Yes, sir.

Q. How long have you been working there?

A. I have been working there since '27.

Q. What age man are you?

A. Fifty-six.

Q. How long have you been a coal miner?

A. Since '27.

Q. Since 1927?

A. Yes, sir.

Q. In other words, you have been working at the
568 Benedict since you have been in the mines, is that
right.

A. Yes.

Q. Were you a member of the local union down at
Benedict?

A. Yes, sir.

Q. Did you hold any office in that union?

A. Yes, sir. I held the president's place a time or two.

Q. For president?

A. Yes.

Q. When was that, Mr. Lynn?

A. Well, I can't recall the first time, the date of the
first time.

Q. Let me ask you this: Were you or have you been
president during the time of 1950, say, through 1953?

A. Yes, sir. I was president from, I believe either in
1951 some time and out in 1952 some time.

Q. Was that in June of 1951?

A. Yes.

Q. To refresh your recollection.

A. Yes.

Testimony of Ellis Lynn

Q. That was president of the Benedict local, is that right?

A. Yes.

Q. Now, Mr. Lynn, in September of 1950 do you remember any work stoppage that may have occurred there over water?

A. Yes, sir, I remember a work stoppage over water but I couldn't recall the date on it, but there were a work stoppage over water.

Q. Was it between—

A. I don't know whether between 1953, in there or not.

Q. Would it have been 1950, back there, about that time?

A. I can't recall the date.

Q. Did you have a lot of water shortage?

A. They had a work stoppage over water, but I don't recall the date, just when it was.

Q. Tell us about that water shortage, that stoppage.

A. I don't believe I was a local officer at that time, and I just don't know, not very much about it.

Q. Did you have any water there at your place?

A. No, sir.

Q. Didn't have any at all? Well, I will get through on this matter and we will go to when you were president.

In the summertime, 1951, in the latter part of July, there is supposed to have been a work stoppage over vacation pay. Do you remember anything about that?

A. No, sir, I don't recall. I guess it is probable it could be but I just don't recall.

Q. To refresh your memory could there have been a strike during that time where the company was wanting to hold back some money from the men, or do you have any recollection?

A. I remember the dispute where they were holding back some money, but I don't know whether a work stoppage or not.

Testimony of Ellis Lynn

Q. Do you remember the dispute but—

A. I remember the dispute.

Q. All right. In October of that year, 1951, there is supposed to have been a work stoppage over credit. Some of the men on the panel had been extended credit and the company stopped it, decided to cut the men on the panel off from credit and said there was a work stoppage over that. Do you have any recollection of that matter?

A. I remember that dispute but I actually—they could have been a work stoppage, I wouldn't say, but I just don't remember the date, whether there were or not.

Q. Do you remember any details about it at all?

A. I don't remember that except I do remember that they had a dispute over there, something over credit.

Q. Do you remember any meeting on that later?

A. No, there wasn't any meeting over it.

Q. Well, sir, in November of 1952 there was a man by the name of Earnest Tabor working for Benedict and it is said that he was discharged because he had been
571 absent from work a great deal and there was some sort of work stoppage. Do you remember anything about that?

A. I remember. I am still remembering a dispute all right. I don't know whether a work stoppage or not.

Q. Do you remember whether you were president at that time?

A. Yes, I was president at that time because I handled that case.

Q. You say you handled it?

A. Me and the vice-president.

Q. Who was the vice-president?

A. Dana Muncey.

Q. Who did you talk with?

A. Mr. Fortner, Bob Fortner.

Q. Bob Fortner?

Testimony of Ellis Lynn

A. Yes, sir.

Q. Who is he?

A. He was—I suppose he was superintendent of the mine at that time.

Q. Now where did you talk to Fortner?

A. We talked it over on the playground in front of my house.

Q. How did you happen to be at the playground?

A. At first he had been down to the office. It was on one Sunday afternoon and he had been to the office and he came up from the office, and in the road, my house is right on the road, and me and Dana was there. It just happened he was there at my house sitting on the porch and he was at my house and we started discussing the thing when he came up.

Q. Had Tabor already been fired then?

A. Yes, and we were discussing it, me and Muncey was, and Mr. Fortner come around and we got to talking to him in the road and off of the porch—

Q. Whose porch was this?

A. Mine, at my home.

Q. Go ahead.

A. And we asked him to consider Tabor, take his family under consideration, and consider him, and he said he would study about it.

And, well, he went on home and he called me over the phone and told me and Mr. Muncey to get a committee and get Mr. Tabor and we would meet and he would talk to Tabor, and if Tabor done the right thing he would put him back to work. And we did and Mr. Fortner put him back to work the next day, on Monday.

Q. Did he say anything about Tabor, why he wanted to talk to him or what he was going to expect out of Tabor?

A. He said he was going to expect him to do better and work regular than he had been working.

Testimony of Ellis Lynn

Q. Well, did you agree then to go back? Did he
573 agree to take Tabor back then?

A. Yes, he agreed on the playground. We asked him to do better and he said he would.

Q. Who all was present when that was going on?

A. There was me and Jim Scott, and Homer Gibson, and Muncy, and Tabor, and Mr. Fortner. That is all I recall.

Q. Do you recall whether you had any work stoppage over Tabor?

A. No—they could have done it but I don't recall. I wasn't working down at that particular mine. I was working in getting off some steel and stuff they had left at these mines they had shut down, you see.

Q. In other words, you weren't working in the mine?

A. Not that particular mine but I was still working in these other mines there, but I was president of the local at that time.

Q. Now, Mr. Lynn, do you have any knowledge of any work stoppage that occurred over the discharge of two men by the names of Jap Anders and Mel Roark?

A. I don't have no knowledge of it, no more than what I heard them say.

Q. Do you have any recollection of it yourself?

A. No.

Q. Do you know or did you know a man by the name of M. M. Campbell?

574 A. Yes, sir.

Q. Do you remember when he was working there at Benedict?

A. Yes, sir.

Q. Do you have any recollection of any meeting with Campbell where Mr. Darst here was present and some other people present?

A. Yes. I met with them one time when Mr. Darst was present.

Testimony of Ellis Lynn

Q. Did you and Campbell get into an argument at that meeting?

A. He did, but I did not. Mr. Campbell did.

Q. What did he have to say?

A. I don't know what all he said. He sort of preached. It surprised me. I didn't know what to say. I didn't know what to say. I didn't have anything to say. Don't remember saying anything to him.

Q. But you were there?

A. Yes, I was there.

Q. Well, now, Mr. Lynn, did you people strike there over Campbell?

A. I don't think so. We could but I don't think so. I would say—I don't know, not as long in my recollection, I don't know of no strike over him.

575 The committee had several arguments with him, but that was the only time, as I remember, ever discussing any question with him, that is, toward anything. I just happened to be in with them at that time.

Q. Mr. Lynn, did you go with Campbell to Norton when Campbell signed a contract with District No. 28?

A. I was up there, but I didn't go with him. I went in my car and he went in his.

Q. Who went with you?

A. Grant Mullins.

Q. Grant Mullins went with you?

A. Yes, sir.

Q. Who was he?

A. He was a committee.

Q. He was on the committee?

A. Yes.

Q. Well, now, had you talked to Campbell before you were going up to Norton about him——

A. No.

Q. Who had?

Testimony of Ellis Lynn

A. Grant was the one. Grant told me Mr. Campbell wanted to go up and sign a contract, and I told him that we had—we had to go to the District office for something, for some other reason, and I don't know what, and if he wanted to he could go up when we did, and him—Grant made the arrangements.

576 Q. When we started up I run across Mr. Campbell down here around Pennington Gap and asked him did he want to go in my car, and he said, "No, I will go in my car," and I never saw him no more until then I saw his car and we got at the office.

Q. Was anybody with Campbell?

A. I believe his son was with him. I am pretty sure his son was with him.

Q. Mr. Lynn, I will ask you if you had a gun which you held on Campbell?

A. No, sir. I don't even own no gun.

Q. Did you sit beside him and have a gun in your pocket.

A. No. He wasn't in my car and I wasn't in his.

Q. Were you in his car at all that day?

A. No, never was in his car or he never was in mine.

Q. Did you ever ride to Norton in a car with him?

A. No.

Q. Did you go to the District 28 office with him?

A. I went up there. He was up there. He followed the part of the way and I stopped at Big Stone Gap to talk to Mr. Scroggs and he passed me, or probably talked to Grant until I came back down, and I believe he went on in front of me from Big Stone on up to Norton, but he followed me up to Norton.

577 Q. Did you go on in the District office that day?

A. Yes.

Q. Did you sit in on any meeting with Allen Condra on M. M. Campbell?

Testimony of Ellis Lynn

A. Yes, sir, I sat with Condra. I don't remember whether Campbell could come in at the time I was in there or not. We had some more business, and I just don't recall what it was, but anyway I talked to Condra and probably Mr. Campbell could have come in but he wasn't in for some time after I got there. I don't know where he went but he did come in.

Q. Do you have any recollection of anything that was said between Campbell and Condra?

A. No.

Q. Do you recall any work stoppage over Campbell there in February or in April?

A. No, I don't think so. No, because I wasn't working. I was working at another mine up there, and I don't recall. It could have happened.

Q. Now, Mr. Lynn, were you working in the mines in May of 1953?

A. In the mine?

Q. At the mine.

A. No, sir, I don't think so. I worked, been working on the outside.

Q. What sort of work were you doing?

578 A. Well, what they call rope rider. First, before the mine shut down on the mountain, I hauled supplies up there. After they shut 10 I worked getting stuff off from there.

Q. Did you do anything other than being a rope hauler; do anything on the outside other than that?

A. Finally, I believe there come a cutoff of something and they cut that off and put me night watching.

Q. Who put you to doing that?

A. Mr. Fortner asked me.

Q. You mean you were working for Benedict?

A. Yes, sir.

Q. While you were a night watchman, Mr. Lynn, do you

Testimony of Ellis Lynn

have any recollection of a work stoppage during which possibly the men voted to return to work and something was involved about a work light there?

A. I suppose they reported to work. I remember a work stoppage. I don't remember how many days they were out, and I couldn't say that they voted to go to work because I wasn't in their local union, but from all appearances they were going to go to work.

Q. Do you know anything about a work light being turned off?

A. Yes, sir. I turned the light off.

Q. You mean, you, yourself, turned the light off?

579 A. Yes.

Q. Who told you to do that?

A. Mr. Fortner called me and told me to.

The Court: Is that not conceded, gentlemen; isn't that agreed upon, that after the 18th, about the 20th of May, that you—

Mr. Rayson: It is our contention that occurred on the 19th.

The Court: Isn't that agreed to and wasn't the explanation made yesterday, and all the proof, why it was done?

Mr. Winston: Your Honor, I think we can agree that on the 20th after Mr. Darst wrote that letter that he did have information that the men were willing to come back to work.

The Court: Now that is my understanding from the proof yesterday.

Mr. Rayson: It may have been. I didn't get that impression.

The Court: Do you stipulate that with him that is the fact now?

Mr. Winston: Yes, sir.

Mr. Rayson: We are not in a position to stipulate that Mr. Darst did not know that before.

Testimony of Ellis Lynn

Mr. Kramer: May I state our position. Our position
580 is that on the 19th, the afternoon he learned we had
voted to go back to work; the sign was on, the work
sign. After that and after he got knowledge or notice that
the men voted to come back to work, he sends down to this
gentleman and has him turn off the work sign and the
next day his foreman comes around and says, "You pulled
a strike and now we are going to pull one." That is our
proof. That is our theory. If they are willing to concede
that——

Mr. Winston: We did concede that.

The Court: Go ahead.

By Mr. Rayson:

Q. Do you remember how long after that work light
was off, Mr. Lynn, that the mines were down?

A. No, sir, I don't. I don't remember.

The Court: Can you agree on that fact, can't you?

Mr. Kramer: I don't think there is any question.

The Court: Agree with him.

Mr. Milligan: It is on the board.

Mr. Winston: Went back on the 28th.

Mr. Milligan: The morning of the 28th.

Mr. Rayson: On the board they have marked all those
days in red which they contend indicate the work stop-
page, whereas now it is——

Mr. Winston: That is correct. The day is the 28th;
581 regardless of what it is.

By Mr. Rayson:

Q. While you were there in the mines——

The Court: Let's make that clarification. Are you stipu-
lating that they went back to work on May the 28th?

Mr. Milligan: Yes, your Honor.

The Court: That is, that they were out from the 18th
until the 28th, is that right?

Mr. Milligan: Yes, your Honor.

Mr. Rayson: Your Honor, it is our contention——

Testimony of Ellis Lynn

The Court: I know it is your contention that you were in the right and they contend they were in the right, but here is a point, Mr. Rayson. There is no use in asking these witnesses over and over that this mine was closed from the 18th until the 28th because that is agreed to, and I do not want another witness asked that question because it is agreed to, and no use of just repeating over and over since that is agreed to.

You can ask him anything you want to but when they stipulate it was out between the 18th to the 28th, don't ask these witnesses over and over on that point.

Mr. Winston: Do I understand from that, your Honor, the men were out of the mine or the mines were just not working?

582 The Court: The mines were not operating. You can ask the men anything you want why it wasn't, but they agree those mines were closed during this period, and I do not want to take up the time of the jury and the Court by continuing to ask something that is agreed to by all parties.

Mr. Rayson: Very well.

By Mr. Rayson:

Q. Mr. Lynn, while you were at Benedict during this period from 1950 to 1953, did you ever had a District man come down and tell you, or did you ever hear a District man come down and tell the local union they ought to go out on strike?

A. No, sir, never did.

Q. Did you ever know of the District having men come down after you were out on those work stoppages?

A. I knowed them to come down but they would be urging the men to go back to work.

Q. Did they ever tell you you were doing right by striking?

A. No, they tell us we are doing wrong.

Mr. Rayson: You may ask him.

Testimony of Ellis Lynn

583 **Cross-Examination, by Mr. Milligan.**

Q. Were you doing wrong?

Mr. Kramer: I object to that.

The Court: Sustained.

By Mr. Milligan:

Q. But they told you you were doing wrong?

A. Yes.

Mr. Kramer: The District men did. Go ahead.

By Mr. Milligan:

Q. Mr. Lynn, let's talk about Mr. Campbell a little bit. When you went up to Norton to join the union, you say you rode in your car and Grant Mullins went with you?

A. Yes, sir, that's right.

Q. And Mr. Campbell came in his own car?

A. That's right.

Q. Do you know a man named E. G. Ely?

A. What?

Q. E. G. Ely?

A. Mr. Campbell had a boy with him, a friend by the name of Ely. I don't know whether E. G. Ely or not, but he was an Ely boy.

Q. Was he up there that day?

A. No.

Q. You did not see him?

584 A. No, sir.

Q. But you do know him?

A. Yes, I know him.

Q. And isn't it correct that you and E. G. Ely and Campbell all rode in the front seat of the automobile?

A. No, sir, not me. I never.

Q. Did you have a pistol with you on that occasion?

A. No, sir, I never had—I never even owned one at the time.

Q. I didn't ask you if you owned one.

A. I didn't have nary one.

Testimony of Ellis Lynn

Q. When you came into the office of the United Mine Workers at Norton, who was there?

A. When I went in there wasn't anyone in there but Mr. Condra.

Q. Who is Mr. Condra?

A. District president.

Q. And then you went in and that put you and Condra—what became of Grant Mullins?

A. Grant was with me.

Q. That made three of you?

A. Yes.

Q. And when did Campbell come in?

A. Well, he came in some time after that. I couldn't recall just when.

585 Q. Who came with him?

A. Nobody came with him, I don't think.

Q. After he got there what did you do?

A. Well, sir, I don't know. Him and Grant—him and Mr. Mullins and Mr. Condra done the discussing of the thing, and I don't know exactly what they did do.

Q. At that time you were president of the Benedict local?

A. I was sitting there but—

Q. The question is not where you were sitting. I was asking you if you weren't at that time president of the Benedict local?

A. Yes.

Q. And you had gone up there for the purpose of being present when Mr. Campbell was going to make his application to join the union, isn't that true?

A. Well, in a way.

Q. To sign the contract.

A. Mr. Mullins said he would be there and we had some more business there to transact.

Q. But that was part of your business.

Testimony of Ellis Lynn

A. Well, if the—sure, that was part of my business to be there.

Q. Now who filled out the application form?

A. Mr. Condra must have filled it out.

586 Q. Did you see him do it?

A. Well, I seen him write on some paper.

Q. And that is the paper Mr. Campbell signed, the same paper?

A. I don't know. I wouldn't say whether I saw Mr. Campbell sign that paper or not.

Q. Do you know whether Mr. Campbell did sign?

A. No, I sure don't.

Q. And you went there for that purpose?

A. No, I didn't go there for that purpose.

Q. Not altogether, but that was part of your mission.

A. I was present. I didn't have a thing in the world to do with it.

Q. Are you telling the jury after driving from where the mine was, or where you came from, to Norton for the purpose of being present when Mr. Campbell signed the application, you left there without knowing he signed it or not?

A. I didn't know whether he signed it or not.

Q. Did you ask anybody whether he signed it?

A. No, sir.

Q. Did you hear any discussion about it?

A. I believe I heard Mr. Mullins say he signed it.

Q. Was that while there or after you left?

A. It must have been after I left.

587 Q. Then when you left you did not know whether he signed it or not?

A. They had the paper there. Of course, I had to read the contract before I knew whether he signed the contract or not.

Q. You saw him there?

A. Yes.

Testimony of Ellis Lynn

Q. You knew who he was?

A. Yes.

Q. Did he have a pen in his hand?

A. Yes.

Q. Do you know what he did with the pen?

A. He wrote on that paper.

Q. So you are trying to tell the jury you saw him write on the paper but you don't know what he wrote?

A. I didn't read it, no.

Q. That was after Benedict had been on strike some time, hadn't it, in connection with this Campbell matter?

A. I don't know that Benedict ever struck over him. They could have. Like I say, I don't know.

Q. What time of year was that?

A. I don't know.

Q. Was it along about February?

A. No, sir. I don't remember whether, just what time of year it was.

588 Q. When did you go out as president of the local?

A. Well, I must have went out in '53.

Q. 1953?

A. Yes.

Q. When did you go in as president?

A. '51.

Q. Did you have a strike in April, 1953, over Mr. Campbell?

A. Not I recall. They could have done it.

Q. You were president of the local then after the time you went to Norton, regardless of whether you know he made the application—you were president after that for some time, weren't you?

A. Well, yes, for some time.

Q. When Campbell's men came down there and wanted to join your local, why didn't you let them join it?

A. I reckon they all joined. As far as I know they all joined the local.

Testimony of Ellis Lynn

Q. As far as you know they all joined the local?

A. All except Campbell.

Q. Don't you know it to be a fact they would not let them join, and they were trying to insist Campbell employ underground miners that had been laid off to construct this conveyor who were not skilled as carpenters and construction men; don't you know that to be a fact?

589 A. That is the first time I heard it mentioned.

Q. You never heard it mentioned before?

A. No.

Q. And you were president of the local?

A. Yes, sir.

Q. And you were supposed to have the interest of the men of the local at heart to see that they were employed?

A. Yes.

Q. And you did not know they had an opportunity to go to work for Mr. Campbell?

A. No.

Q. You never heard of it until this morning, is that right?

A. He did not work any of the Benedict men that I know of.

Q. Did you try to get him to work any of them?

A. No, I didn't try to get him to work any of them. Like I told you, I never did talk to Mr. Campbell but once.

Q. You never mentioned it to him?

A. No. I didn't mention it to him.

Q. You never suggested he take these laid-off men and put them to work at building this conveyor—you know what I am talking about when I say conveyor. It is something that carries slack or coal from one point to another on a cable. You knew that was what he was putting
590 in, didn't you; you know that?

A. I knowed about what he was putting in, but it wasn't nothing like that.

Proceedings

Q. What was it?

A. It was something like a bucket line. Carry slate from one place to the other.

Q. Bucket line?

A. That is what I would call it.

Q. Was that what he was putting in, a bucket line?

A. That is what I would call it, a bucket line.

Q. Did he ever get it up?

A. No.

Q. Do you know why?

A. No, sir.

Q. But you never heard of any difficulty over Mr. Campbell as far as the employment of the laid-off Benedict underground miners?

A. That wasn't never mentioned to me. The committee was meeting Campbell pretty often.

Q. Isn't it a fact you were in a meeting in the office in which Mr. Campbell was there and you say he got rather excited in his conversation with you?

A. Yes, sir, he did.

Q. And is it not a fact you told him that he was employing scab labor, and that is what started it?

591 A. I don't recall what—I don't recall how come him to get—

Q. You don't remember whether you told him that or not?

A. No, I don't, but I know he got all worked up over something.

Mr. Milligan: Stand aside.

Mr. Rayson: That is all.

(Witness excused.)

The Court: Keep in mind the instructions I have heretofore given you, lady and gentlemen. Adjourn Court until 9:00 o'clock tomorrow morning.

(Whereupon, Court adjourned at 5:58 p. m. until 9:00 o'clock a. m., March 22, 1956.)

Testimony of Charles Fritz

592

Fourth Day of Trial.

Thursday, March 22, 1956.

(Whereupon, at 9:03 a. m. Court reconvened pursuant to adjournment, and the following proceedings were had in the presence of the jury, to-wit:)

The Court: All right, gentlemen, you may proceed.

CHARLES FRITZ,

called as a witness by an on behalf of the cross-defendants, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Kramer.

Q. Your name is Charles Fritz?

A. Yes, sir.

Q. How old are you, Mr. Fritz?

A. Fifty-two.

Q. Where do you live?

A. Coeburn, Virginia.

Q. What is your occupation?

A. I am general mine foreman for the Clinchfield Coal Company, boss of No. 2 mine.

Q. Were you formerly employed by the Benedict Coal Corporation?

A. Yes, sir.

Q. A stockholder therein?

593 A. Yes, sir.

Q. What was your period of employment by Benedict?

A. I went with the company, it was either the latter part of 1943 or the first of 1944, and I stayed with them up until either the last of April or the first of May, 1951.

Testimony of Charles Fritz

Mr. Kramer: Incidentally, I made a statement yesterday that I wanted to correct.

I stated that there was no question about there being all of the work stoppages or strikes that were indicated on this chart. Upon further investigation my attention was called last night that I made what I think is an error, that the so-called strike or stoppage which was known as the Tabor strike, the stoppage which was November 2nd and November 7th. Our people deny there was a work stoppage or strike.

I mis-stated that yesterday. I thought there were three and there were two.

The Court: What are those dates, Mr. Kramer?

Mr. Kramer: November 2nd and 7th, 1951, your Honor.

The Court: All right.

By Mr. Kramer:

Q. You left there in what time, 1951?

A. It was the latter part of May or the—the latter part of April or the first of May. I can't recall the date.

594 Q. During the period you were there when there would be some misunderstanding or trouble between the union local and the company, did you sit in on any of the meetings?

A. Yes, I did.

Q. And you say your capacity at that time was what?

A. Superintendent.

Q. You were the second man there, actually, on the job under Mr. Darst?

A. That's right.

Q. Do you recall a meeting that was had, whether you recall the date or not, with reference to the seniority when they were closing certain of the openings and opening new openings?

A. I do remember but the dates I can't recall.

Q. Did you set in on a meeting at that time?

A. Well, I don't know if this was this particular meet-

Testimony of Charles Fritz

ing. It is possible that they could have had a meeting I didn't sit in on. As far as I do know and remember I did sit in on them.

Q. Do you recall whether Mr. Scroggs was present at that meeting?

A. I am sure that he was.

Q. Do you recall anyone else who was present at the meeting you sat in on?

A. One man in particular was Grant Mullins.

595 Q. Grant Mullins?

A. Yes.

Q. He was a member of the mine committee?

A. That's right, and as to the other members, I am not positive. We had different committees.

Q. Was Mr. Darst present at that meeting?

A. Yes, sir.

By the Court:

Q. What date was this, Mr. Witness?

A. I can't remember the date.

By Mr. Kramer:

Q. It was a meeting, as I recall, over the seniority, the men were being moved from one place to another.

A. Yes.

Q. Do you recall there was a strike or strike on at that time?

A. There had been.

Q. What was the nature of that meeting, the purpose of it?

A. The fellows were out on a strike. It was over the seniority from closing of one seam and opening up another one, and some of the fellows they thought they should have a job down at this particular mine that we had planned on keeping running and we contended that some of them probably was due jobs when other ones weren't.

596 Q. Was it settled, worked out and agreed?

A. The best I remember there were.

Testimony of Charles Fritz

Q. Will you please state what was Mr. Scroggs' attitude as to what he said and did there?

A. Well, the attitude that I think Mr. Scroggs did take was to try to get the thing settled and the men back to work, and as far as anything that he did say in respect to this meeting, that if it did go before the arbitration board it might not be settled to suit the company or the men, either. That is the best I remember.

Q. That was his statement?

A. Yes.

Q. It would go to arbitration, if it did it might be unsatisfactory to one or both?

A. That's right.

Q. He tried to get a settlement in the meeting?

A. Yes.

Q. As a result of that it was settled?

A. As far as I know.

Q. The men went back to work?

A. They did not go before the arbitration board.

Q. Did you ever hear Mr. Scroggs say at any meeting, "Men, you will have to take the matter in your own hands," any such statement as that?

A. No, sir.

597 Q. Never heard any such statement as that?

A. No.

Q. Why did you leave the Benedict people in May, 1951?

A. Well, just like I said, it might have been the last of April or the 1st of May—

Q. About May 1st.

A. The work was working through to where the personnel we did have—in other words, just too big for the production that we were carrying, you see, to keep the personnel that we did have, so Mr. Darst did say to me, he asked me if I thought I could get a job, and I told him I thought probably I could, and he told me he would give me a month's salary.

Testimony of Charles Fritz

Q. There was no bad feelings?

A. No.

Q. No hard feelings, no bitterness between you and the company?

A. No.

Q. Coal was getting more expensive?

A. Someone had to get out.

Q. There was no misunderstanding, hard feelings, between you and the company?

A. No.

Mr. Kramer: Cross-examine.

598

Cross-Examination, by Mr. Winston.

Q. How many meetings did you attend over this seniority dispute, Mr. Fritz?

A. Well, sir, just to recall the number of meetings, I am not able to do that, but I think as far as I know, up until the time I left the company, that I did sit in on the meetings but it is possible they could have had a meeting that I would be out on the job that I wasn't called in on, if they did have a meeting I was called in on. As I say, I don't remember.

Q. There could have been a meeting you weren't in on?

A. Yes.

Q. At the meeting you did go to, Mr. Seroggs was there?

A. Yes.

Q. He said if it goes to arbitration it might not be satisfactory to the company and the union.

A. Yes.

Q. In other words, he did not want it to go to arbitration?

A. No, I can't say he did not want it to go to arbitration.

Q. That was his statement, wasn't it?

A. No. He only said just what I told you.

Testimony of Charles Fritz

Q. The statement you gave us?

599 A. Yes.

Q. That is what his position was, and Mr. Darst did want it to go, didn't he?

A. No. I can't say Mr. Darst wanted it to go before the arbitration board.

Q. And the strike was going on at that time?

A. It either was going on at that time or it had been and they were resuming work and they were in there trying to get it settled, not to take it before the arbitration board.

Q. During that period of time you had quite a few strikes?

A. Yes, there were quite a few strikes. As far as identifying any particular strike and date, I am not able to do that.

Q. That affected production, didn't it, those strikes?

A. Yes. In other words, it stopped your production when you were on strike.

Q. Were you ever able to discharge a man without a strike or trouble?

A. Well, offhand I can't give you a correct answer on that, yes or no.

Q. You did have lots of strikes?

A. Yes.

The Court: Let's not repeat. You keep going over and over, let's stop that. Stay right on the point without any repetition.

600

Mr. Winston: That is all.

(Witness excused.)

Testimony of E. L. Scroggs

E. L. SCROGGS,

called as a witness by and on behalf of the cross-defendants, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Kramer.

Q. How do you sign your name?

A. E. L. Estes Lloyd.

Q. I believe sometimes you have been referred to as Lloyd Scroggs?

A. Most generally it is Scroggs or Lloyd.

Q. How old are you?

A. Fifty-four.

Q. Where do you live now?

A. Norton, Virginia.

Q. Are you connected with District 28 of the United Mine Workers of America?

A. Secretary-Treasurer at the present.

Q. Of that District?

A. Yes, sir.

Q. How long have you been Secretary-Treasurer of that organization?

601 A. Since June 15, 1952.

Q. Prior to becoming Secretary-Treasurer of District No. 28, what was your position?

A. Field worker.

Q. How long were you a field worker?

A. From January 1, 1934 to June 15, 1952.

Q. Where were you stationed during that period of time?

A. Well, I had—our district was divided into what is known as three fields—some of them call it three districts. It is three fields.

Q. Was that whole period with District No. 28?

Testimony of E. L. Scroggs

A. That was the whole District 28.

Q. Was your entire period as a field man working for the District No. 28?

A. That's right.

Q. Go ahead and describe it.

A. Well, I had what was known; generally spoken of as the St. Charles field, and I guess it comprised some five to six hundred mines and run anywhere from, as presently 3,000 to in the peak of it 6,000 miners.

Q. How many different operations or companies were operating within your field?

A. Well, there was possibly some 25—I couldn't be exact on it—30, counting the small mines and all.

602 Q. What were your duties as a field representative?

A. Well, in my duties as field worker I handled grievances for the organization, trying to settle disputes that arose between the local unions and the coal companies.

Q. And your work of that type covered these 28, whatever number of operations there was, 15, 20 or 28, in your particular area of the District No. 28?

A. That's right.

Q. Was the Benedict operation within your such field?

A. It was.

Q. As I understand this record you were not there all the time. A little bit of the time there was a man by the name of Clark who was there, maybe somebody else—

A. That's right. From 1952 on Mr. Clark was there.

Q. You were the field agent in 1950 and 1951 and part of 1952 that generally looked after complaints, trouble and so on, with reference to Benedict, were you not?

A. That's right.

Q. Mr. Scroggs, do you know a man by the name of Jim Scott?

A. I do.

Q. According to this record he was a committeeman

Testimony of E. L. Scroggs

from one of the Benedict mines during a part of this same period, is that correct?

A. That's right.

603 Q. I will ask you, Mr. Scroggs, if you ever had a conversation with him in which you said to him, "Now I can't tell you or the local union to strike, but when I tell you, or when I say"—words to that effect—"you know what to do, you may take the thing in your hands," or words somewhat similar to those?

A. I did not, and I don't recall ever having a conversation other than with the full committee with Mr. Scott or a conversation possibly in local union meetings.

Q. I want to ask you if you ever met him on the street somewhere and said to him that "I have confidence in you and you are the one man I can trust," and then went on with the conversation similar somewhat to which I have already described?

A. I did not.

Q. Did that ever occur at all?

A. No, sir.

Q. Or anything similar to that?

A. No, sir.

Q. Mr. Scroggs, there was a strike or work stoppage in April of 1950 known as the one over seniority. Were you called into that?

A. I was, I think.

Q. Do you recall when you were first called in, just what you did in that?

604 A. That would be pretty hard to recall dates.

Q. You don't need to tell the exact date, but you recall the strike?

A. I recall being called in on the strike, and at that time I was called in, I was called by the coal company which very frequently, if the company was not able to settle with the committee they picked up the telephone and either called my house or called the District office and

Testimony of E. L. Scroggs

asked me to come down. They called at that time and I went there because I was more or less a neutral party. I didn't particularly——

Q. Did you go down at that time?

A. I did.

Q. Do you recall having a meeting?

A. Yes.

Q. Can you tell us briefly, not in too much detail, what transpired, what you said, what Mr. Darst said, or anyone else.

By the Court:

Q. Mr. Scroggs, I didn't get what that was about, what that meeting was about.

A. The cut-off.

Q. In what year?

A. 1950. Is that right?

Mr. Kramer: That is the one I am asking about.

The Court: Go ahead.

605 By Mr. Kramer:

Q. It is what we call the seniority or the cut-off between the mines.

A. Some seams had worked out and in working out it had displaced—they call it a cut-off, but it is really a displacement of men due to the mine working out, which is customary for the coal companies, and it is also a contract that they place up all employees that have worked in these closed-down mines due to the working out, whatever it may be, to put them in the jobs that are left in operation.

Now the question of a mine might involve four or five different openings all through the same tippie, and under our contract the employees—that company might take in four or five different openings, which some people refer to as mines, but they are all one coal company and one mine actually under one tippie.

Q. What was the difficulty when you got down there?

Testimony of E. L. Scruggs

A. The company and the committee could not agree on the question of placing up the various men. And during the discussion I didn't make any discussion on any specific individual, it was a general over-all picture, and I insisted the company place up such men as were qualified on such jobs that were available rather than hiring new employees for jobs that these older employees could do.

Q. Was the matter settled at that time?

606 A. Well, I think it was generally conceded at that time that the company would place up such men qualified; yes. I would say it wasn't exactly—under those kinds of questions maybe you hear grumblings and disagreements later on by individuals; but, generally speaking, I would say I believe it was.

Q. Did you make any threats to encourage or ask the men to go on a strike at any of these meetings?

A. This meeting was very pleasant; there wasn't any use of threats or anything. It was only a question of qualifications and what was stated in the contract.

Q. Did you request an arbitration or refuse—

A. I never was requested to arbitrate.

Q. It never was required to go to arbitration?

A. No, because the company called me down there which, when they always do—that was one setup of settling their disputes, when they called me down there, and I think it is generally understood if I can reach an agreement, the contract says—it is a question of contract.

Q. You did reach an agreement there?

A. We did.

Q. The next one is the one over some water, where there was no water available in the camp. Did you have anything to do with that?

A. If I recall on that one I did not meet the coal
607 company, or never was asked to. I think that might have been a stoppage of work and I attended a meeting and advised the men to go back to work.

Testimony of E. L. Scroggs

Q. You met alone at the office with the men, that is of the local, and you advised them to go back to work?

A. That was in a meeting with the members of the local.

Q. You never discussed that with Mr. Darst or any of the management?

A. I never was asked to by the management or the committee.

Q. The next one we talk about is known as the Collingsworth strike, which I think was in January, 1951, over a foreman by the name of Collingsworth. Do you know anything about that one?

A. Yes, sir.

Q. Will you just explain what happened, what you know about it, how you got into it, in your own way and don't give details.

A. I was called by the company again, I think, I am pretty sure, and asked to come down, they would like for me to sit in the meetings with them.

I went down and was told what the question was, what the dispute was between the committee and the company, which usually both sides tell me what their question is.

Q. Was Mr. Darst there?

698 A. Yes, sir.

Q. The committee there?

A. Yes. And——

Q. Just one minute. The meeting was closed, all the men of the local wouldn't be there?

A. No, just the three of the grievance committee involved in that particular opening.

Q. And representatives of the company?

A. That's right.

Q. Go ahead.

A. They told me what the question was, on Mr. Collingsworth, and I immediately said, "No, not me." I said, "I am not getting into nothing like that."

Testimony of E. L. Scroggs

I said, "We always take the position the company don't tell us who our various committeemen are and we don't tell them who their bosses are, and we don't assume no liability on that."

That is about all I said in the whole meeting, and the question was discussed there between the committee and the management, pro and con, which I sat in on as an observer to the meeting, and the best I remember it was adjourned and there was some other discussion which the management and the committee seemed to be pretty well satisfied about, and we went on about our business.

Q. Do you recall how the management and the committee worked out that matter?

A. Well, they discussed the question. I understood the management to tell the committee that they did not have anything to worry about, that Mr. Collingsworth was in charge of that mine—as I recall he was in charge of it, what we call in charge, a general mine foreman—only temporary, they were going to move another fellow from another place and Mr. Collingsworth would be what we say second in command under the man they were going to move down, which seemed to be satisfactory to the committee and there wasn't any more protest.

Q. Did you take any position that the men should strike or take the matter in their own hands?

A. No, the only thing, as I said a while ago, was the only thing I had to do with it.

Q. It was a dispute over a boss and you could not participate in it?

A. That's right.

Q. Did you meet with the committee?

A. I met with them and asked them to go back to work.

Q. Is that the local union?

A. To all the members of the local union—maybe not all, but all those attending the meeting.

Testimony of E. L. Scroggs

Q. Was it the custom after one of these joint management meetings with the committee and you present, then that they would have a meeting of the members, of the local members?

A. Yes, because usually after the thing, later we called a meeting regardless of how the grievance went, why a meeting was called to ask the men to return to work because most of the time it has been the practice that we do that.

Q. You did attend this meeting following the Collingsworth difficulty?

A. I did.

Q. Did the men take action to return to work?

A. They did.

Q. The next one involved here is the one known as the vacation pay, which according to the record was the latter part of July, 1951. Do you know anything about that?

A. Yes, I do.

Q. Were you in any way connected with a meeting on that occasion?

A. Yes, sir.

Q. Go ahead and tell us what you know about it.

A. Our contract provides that vacation pay is due the last pay day in June, and if I recall correctly why the coal company failed to pay off a number—I couldn't state the definite number of our men, on the last pay day in June, and that arose a difficulty between the committee and the management because they hadn't paid off

611 in the last pay day in June.

Some time around about there, I don't know what date, I was in on the meeting, and the company asked me what I thought about the contract, that they could do, and I told them the way I understood the contract I thought they would have to pay the men.

Testimony of E. L. Scroggs

Well, that is all that happened at that meeting. Later I recall that they had a stoppage of work down there, which the company at that particular time dealt strictly with the committee. I don't know what the adjustment was, only hearsay.

Q. You were not present at the meeting later, the last part of July, when the strike or work stoppage occurred?

A. Nothing except the local union meeting when the men were advised to go back to work.

Q. After they had had this meeting the last of July with the management and the committee and which you did not attend, did you attend a meeting of the local?

A. I did.

Q. Will you tell us about that meeting. I am talking about over this same question, vacation pay.

A. We had a meeting at the local union down there and there was quite a controversy in that meeting over the men returning to work, and particularly I recall some two or three different fellows who, at lots of meetings, 612 wanted to talk last. They kept getting up after I had—

Q. Like Mr. Moses, but go ahead.

A. Would get up after I talked lots of times and they would talk against returning to work after I had advised the men to return to work.

Q. Did you advise the men or how did you advise the men I should say?

A. I advised them to return to work.

Q. In that meeting?

A. Yes.

Q. Who, if you know, was anyone that opposed it?

A. Mr. Scott in particular was the last fellow that was on the floor opposing my orders because of the men returning to work.

Q. There have been two or three Scotts referred to in this record, would you identify them.

Testimony of E. L. Scroggs

A. This was the Scott that was on the committee.

Q. Jim Scott, who testified yesterday?

A. Yes.

Q. What did Jim Scott, what position did he take in that meeting as a committeeman?

A. He was taking the position that the men shouldn't go back to work until all of them had their money. At that particular time the men did not have their money.

My understanding, as I said a while ago, that the
613 company had agreed with the committee they would pay the fellows but they hadn't paid, and he was taking the position not to do a thing until they were paid.

Q. What position did you take in that argument and what recommendation did you make?

A. I took the position they should return to the mines to work and the thing could be settled. I understood with the committee the company had agreed to settle.

Q. Was a vote taken?

A. There was.

Q. Did they follow your recommendation or Scott's?

A. They followed my recommendation after some considerable discussion in the meeting.

Q. And voted to go back to work?

A. Yes.

Q. The next one that I want to refer to is the so-called credit strike which occurred in October, 1951. You have heard that mentioned, and that is the one—you have heard the proof—that is the one you recall where they said that the union—I mean the company had certain men who were laid off and on the panel and were denying future credit. What do you know about that, if anything?

A. I think I were in on that meeting too, and I am sure I was.

Q. Tell how you got in it and what happened?

Testimony of E. L. Scroggs

614 A. I was called in by Mr. Darst to attend a meeting because the company, my understanding was at the time I attended the meeting, had notified members of this local union they could no longer, or would no longer carry its members on credit, which had arose in a controversy between the grievance committee and the company over the credit question.

Q. Were the men out on strike when you went down there?

A. I wouldn't say definitely that they were on strike at that time. I am just not too definite about that particular question.

Q. Anyway, you were called in and tell what happened.

A. Well, I, of course, insisted that the company try to carry these fellows as far as they could and go as far as they could, and the company was saying they had went as far as they could already go. And to my best recollection there wasn't any agreement made on that thing at that particular time.

When we left, I don't recall anything being done at that particular time, any agreement or anything.

I was advised later that possibly the local union and the company did but not at that particular time.

Q. Did you have any control over the expenditure of union funds, local funds of the local union?

A. I do not.

615 Q. Have anything whatsoever to do with that?

A. I do not.

Q. Did you urge or recommend or ask the men to stay on strike?

A. I did not.

Q. Have anything to do with any recommendation of a strike or telling the men—did you tell the men, "You know what to do," or "You are on your own," any words to that effect?

Testimony of E. L. Scroggs

A. No, sir.

Q. Did you have anything to do with the calling of the strike that occurred over this vacation pay?

A. No, sir.

Q. Did you ever advise Jim Scott or anybody else that they were on their own and they knew what to do?

A. No, sir.

Q. Did not happen?

A. No, sir.

Q. Let me ask you this question about—do you know this man Tabor that was discharged because of irregular work; do you know anything about that at all?

A. I know him but I don't know anything about that grievance.

Q. The next one that question is made in this record is the so-called Campbell strike, over a man by the name of Campbell, and which is claimed to have occurred on February 8, and later another one over this man Campbell, his men, which they say happened on April 24 and 25, talking about 1952. Do you know about the Campbell affair?

A. Yes.

Q. Will you start with your first contact with it, how it arose, and tell his Honor and these lady and gentlemen of the jury what transpired.

A. Well, the first as I ever knew about the Campbell strike, as I stated a while ago, sometimes it might be two weeks before I am around one of these mines, but some time between the last time I had been there and this particular time they had hired a man by the name of Campbell which I had heard about. He came to my house—I live at Big Stone Gap—

Q. Mr. Campbell himself came to your house?

A. Personally.

Q. Was he by himself?

A. By himself.

Testimony of E. L. Scroggs

Q. Anybody with you at the time this occurred?

A. Nobody except my family may have been around somewhere. He came in my living room at home.

Q. How much family do you have?

A. I have got three boys and two girls. Of course, they come and go and I couldn't tell you how many were at home at that time.

617 Q. Tell us what happened when he came to your house.

A. He came up there and told me who he was. I had never met the gentleman, didn't know anything about him. Told me what happened, he had a contract with Mr. Darst to do some construction work and he was having some difficulty. I believe he said his men were getting scared off or something, over the question of him working there, and he wanted to know if I would take him in the union and help him out.

I said, "Well, I don't know about that. I will look into it and see, but I couldn't give you a definite answer. I am not too well acquainted with your case and I will look into your case and see."

And I questioned him some little regarding his contract with the company, and later I went down—

Q. Before you leave that, I don't think it is too clear—was he asking to be taken into the union as a member or get a contract with the International and operate under a union contract?

A. At the time he was talking to me he was talking about both, the way I took it. He would have had to have a contract before we could have taken him in, and he was talking to me about personally becoming a member of the local union, and I would have taken for granted both.

Q. After he came to your house and had the discussion, what is your next contract that you know of?

618 A. I made, some few days later—I couldn't tell you just exactly when—I made some check among the

Testimony of E. L. Scroggs

members of our local union as to just what was transpiring down there, and that is all I heard of it at that particular time.

Q. Pass on to the next occasion.

A. The next occasion was over some controversy. I was called to meet at Mr. Darst's office up there, Mr. Darst, Mr. Campbell and the mine committee were there, and—

Q. Do you remember the names of any members of the mine committee that were present at that meeting at Mr. Darst's office?

A. Grant Mullins, and the president of the local was in there, Ellis Lynn, and Tyler was one of the committee, and the other one was a fellow named Gibson, I believe.

Q. Tell us about this meeting in Mr. Darst's office which pertained to Mr. Campbell and his relationship to Mr. Darst and to the union.

A. In the meeting, there hadn't been but a few words said until Mr. Campbell was up on the floor waving his arms around and talking to the top of his voice, and I don't believe anyone could understand what was going on, and after a while Mr. Darst, when Mr. Campbell sit down, he took it up. About all I did was try to listen to Mr. Campbell. He was on the president of the local union.

Q. Who was that?

619 A. That was Mr. Lynn.

Q. Mr. Campbell and Mr. Lynn got into an argument?

A. He was directing the biggest part of his argument to Mr. Lynn. He was talking to everybody but personally he was looking at him.

So that meeting went on for some little length of time under those conditions, and finally I got up and told them, I said, "Well, you gentlemen called me down here in this thing, and if you ever take a notion you want to do business call me back," and I got up and walked out.

Q. Why?

Testimony of E. L. Scroggs

A. How is that?

Q. Why?

A. Well, I couldn't transact no business under those kind of conditions.

Q. Did you make any statement in that meeting that if some arrangement was not worked out that there would be a strike or the Benedict people would have difficulty?

A. I didn't have an opportunity to make any statement in that meeting more than I told you.

Q. You did not make any such statement?

A. The only statement I made was in the latter part of the meeting whenever I told them that when they got to where they wanted to do business they could call me back. That was the only statement I made during the whole meeting.

620 Q. Do you recall what date that was?

A. I couldn't tell you the exact date.

Q. Do you recall whether the men, the Benedict men were out on strike at that time?

A. I don't believe they were at that time.

Q. Were you later at any other meeting in which Mr. Darst and Mr. Campbell were both present?

A. No, I have never attended another meeting with the officers of the company and Mr. Campbell.

Q. Did you have any further contact with Mr. Campbell?

A. Well, nothing more than except the local union, possibly put the local union back to work.

Q. What can you tell us about any time you put the local union back to work—let me ask you, are you talking about back to work at the Benedict place?

A. Yes.

Q. All right.

A. I think there was a controversy there, but there was numerous controversies during this period between the local union and Mr. Campbell when I would be attending

Testimony of E. L. Scroggs

meetings down there. They were always coming up by individuals about them not being paid their wages and the treatment they were receiving at the hands of Mr. Campbell, and they were wanting to know more or less just what could be done about it and the protection of their rights.

621 Q. Those are the Campbell men?

A. That's right, and they got into a strike there, the best I recall, one time.

Q. Campbell or Benedict?

A. At Benedict, and I was attending a meeting of the local union and advised the local union to go back to work, which I suppose they did. I was not called back on it which I usually would have been if they didn't return.

Q. Was there opposition in the Benedict local at that time to return to work?

A. Yes, there was quite a little bit of opposition there. I recall at that particular time some several fellows there who they thought that work should belong to was the Benedict Coal Company was having the work done and they thought it was possibly a subterfuge to get out from under the contract of the coal company, and discussed it in those lines, and didn't think Mr. Campbell ought to be there, and some of the men did not want to return to work. Again Mr. Scott was one at that particular time.

Q. This same Mr. Jim Scott?

A. That's right.

Q. Do you recall what the result was when you urged him to go back to work?

A. They returned to work, as my understanding.

Q. Did you at that time tell the men that "You are
622 on your own, you know what to do," or use any words similar to that?

A. No, I did not.

Q. Did not?

Testimony of E. L. Scroggs

A. No.

Q. The next one, there is a discussion in this record of a man by the name of Roark and a man named Anders that had some trouble, I believe it was in August, 1952, over something about a motor going over the hill. Do you know anything about that one?

A. I was not a field worker at that time.

Q. You know nothing at all about that?

A. No.

Q. The next one was the 40¢ or \$1.90 negotiation agreement by Mr. Lewis and Mr. Moses. Do you know anything about that one?

A. Well, all I know about that, that Mr. Darst called me.

Q. You mean on the telephone?

A. On the telephone in the office one time, and said he was having some trouble with his men in the local union down there. And I can't give you the direct exact words maybe, but he said something about like this, the best I recall "they are willing to go along down there, that they like to work and willing to go along."

623 Q. Do you mean the company was?

A. The company was, which I didn't know what it was over any more than Mr. Darst. He said it was all over the \$1.90. I was at Norton, several miles from the plant, and only know what he said, and I didn't go down to see it that time, and he said they were willing to go along, and he indicated he wanted me to accept the \$1.90 and tell the fellows to accept it.

I think I told him at that time that I couldn't accept a thing like that, that—

Q. At that time, that is, in October, 1952, and I believe under your previous testimony you were the secretary-treasurer of the District and not a field representative, is that correct?

A. That is right.

Testimony of E. L. Scroggs

Q. When was it you told us you did become secretary?

A. I became secretary the 15th of June, 1952.

Q. Did you or anybody else in the District, connected officially to the District, ask the men to stop work or go out on strike at that October time?

A. No.

Q. Did you have anything to do with them going out on that stoppage or strike?

A. I wasn't even attending local union meetings myself at that time.

Q. Whether you were at the local union meetings or
624 not, did you send anybody any word, communicate with them or aid or encourage them to go out on that strike?

A. No.

Q. Did anybody connected officially, unofficially, any officer of District No. 28 have anything to do with that work stoppage or strike?

A. No. I am quite sure they didn't.

Q. According to the record there was a meeting called by the President of the United States with reference to this occurrence, which was somewhat spotty but nationwide in character, and Mr. Lewis sent out a telegram to the presidents of the various Districts.

Do you know anything about District No. 28 getting such a telegram or message?

A. I recall being told about the telegram when it came in by the President of the District.

Q. Who was president at that time?

A. Allen Condra.

Q. Do you know what steps, if any, Mr. Condra took in response to Mr. Lewis' telegram? If you know, all right; if you don't, we will pass over it.

A. He sent out telegrams, to my knowledge, to the local unions asking them to return to work.

Testimony of E. L. Scroggs

Q. Do you remember whether you contacted the local committee of the local union?

625 A. I don't recall that I did personally at that time.

Q. There is one more involved in this and that is the occurrence over Big Mountain, which the company claims caused a strike or stoppage at their mine for two days, the 18th and 19th of May, 1953, and that thereupon they themselves did not open up the mine until the 28th, I believe it was. Did you have any connection or know anything about that?

A. No. I had no connection with that work stoppage.

Q. Of course, you were not a field man at that time?

A. That's right.

Q. It is stated in this record that about that time, or some time in May, either the last of April or early in May, Mr. Swisher, I believe that is his name, who was the president or chief executive officer at least of the Big Mountain Coal Company, and a man by the name of Rains, who was a bookkeeper or some similar position, arranged a meeting with the president of District No. 28, whom I believe at that time was Mr. Condra, and that a meeting was held by Swisher, Rains and Condra.

Were you present at any such meeting?

A. I was not.

Q. Did you have anything to do with it or participate in it?

A. The only thing that I know about, Mr. Darst called Mr. Condra and I one time, and that was, the mine
626 had not gone back to work yet. It must have been—

Q. The Benedict mine or Big Mountain?

A. Benedict. It was one time they were supposed to have turned the light off and put up a no work sign after the men voted to go back to work.

Some time between the time they went back to work,

Testimony of E. L. Scroggs

which was close to the time they went back to work, Mr. Condra came in and said Mr. Darst wants to see us—"See me back down at Benedict. Do you want to go with me?" and I said yes.

He and I went down to Mr. Darst's office at Benedict—the first discussion Mr. Darst wanted to work his mine on gang work basis which Mr. Condra told him was a contract violation and he couldn't agree.

Q. Will you explain what gang work basis is.

A. The term "gang work" as ordinarily used by the miners is where they are paid so much per ton or a gang of men which may consist of different numbers, divided equally between the number of men that are mining that coal there.

In other words, if you get 50 tons at a dollar a ton, to give you an illustration, and you got 50 men, you would get a dollar apiece. It is divided equally on the basis of the amount of tons loaded.

Q. By the number of men in this particular gang or group?

627 A. That's right.

Q. At one time was that policy followed in the United Mine Workers in certain specific instances?

A. There is an instance in our contract in an isolated place only that that procedure could be followed.

Q. Mr. Darst asked you if you would agree to make an exception for him and put a gang work basis in for all of his men or part of them or what?

A. All of them.

Q. And did you hear Mr. Condra reply or you reply who made the reply?

A. Mr. Condra.

Q. What was it?

A. He told them it was a violation of the contract and we couldn't agree to anything like that.

Testimony of E. L. Scroggs

Q. Did Mr. Darst want to arbitrate that?

A. I don't think he said anything about it.

Q. You don't think he said anything about arbitration?

A. No. The next one, Mr. Swisher was in on this.

Q. Was Mr. Swisher present at that time?

A. He came in the meeting, yes.

Q. Do you recall the date of this meeting, Mr. Scroggs?

A. I don't know. It strikes me it was up there around the 26th or 27th, but I wouldn't be positive to that date.

Q. Talking about the month of May, 1953?

628 A. That's right.

Q. Go ahead.

A. Mr. Swisher came in there and he and Mr. Condra discussed the question of his men having a charter, and that is all I know now about the Big Mountain Coal Company.

Q. Did you enter into that discussion?

A. No. I was more or less what you might say a listening.

Q. Do you know anything about a certain claim that has been made here that the Benedict people, members of the Benedict local, placed a picket line across the road during this month of May, 1953, so that men who wanted to work at Big Mountain would have to cross the picket line and they refused to and did not go to work?

A. No, I don't know anything about it except talk and rumors.

Q. Did Big Mountain call you about that?

A. Did not.

Q. I want to go back to one thing I overlooked a moment ago when we were talking about Mr. Campbell.

Were you present at the office of—I may have asked you. Were you present at the office on a day when Mr. Campbell came up into the District office in May, 1952, or April, 1952, whenever it was, maybe it was February, I

Testimony of E. L. Scroggs

guess it was, February, 1952, and there was some
629 discussion about him signing a contract?

A. Now, you said was I present at the office. I was not present at Mr. Condra's office. I may have been in my own office. They may have passed by and said, "Howdy," or something.

Q. But you did not participate in the meeting?

A. None whatever.

Mr. Kramer: You may cross-examine.

Cross-Examination, by Mr. Milligan.

Q. Mr. Scroggs, since 1932 or 1934, I don't recall which it was, you have been identified with the United Mine Workers either in the capacity of field representative or some other capacity, isn't that true?

A. That's right.

Q. Was it 1932 or 1934?

A. 1934.

Q. Where was your office, headquarters?

A. Where is it?

Q. Where was it during this period in question, that is between 1950 and 1953?

A. Norton.

Q. How far is Norton from the Benedict mines?

A. Let's see.

Q. Just approximately.

630 A. I would say approximately 60 miles.

Q. Sixty miles?

A. Yes. That might be a little more or less.

Q. Well, I just want a general idea. You testified that you knew Jim Scott and at the time you referred to Jim Scott was on the committee, is that correct?

A. That's right.

Q. On this first strike or work stoppage—which do you call it? I have heard various names. Do you call it a work stoppage or strike?

Testimony of E. L. Scroggs

A. Well, I guess I am like most every fellow, maybe call them both. I may call them one thing one time and the other the next time.

Q. First one and the other?

A. That's right.

Q. On the occasion of this strike of April 14 and 17, 1950, you said you did not remember the date, I am not trying to pin you down to that, but it is identified as the seniority question. You did attend a meeting which Mr. Darst was present in reference to that matter, didn't you?

A. That's right.

Q. And Mr. Darst wanted to arbitrate and you didn't think it was advisable?

A. He never mentioned it if he did.

Q. He did not mention it?

631. A. No, sir.

Q. You are sure he did not mention it?

A. When you arbitrate, you have to file a grievance.

Q. But you made the statement that you thought arbitration might not be satisfactory and you opposed it; you stated that on direct examination, didn't you?

A. I don't know as I said anything about opposing arbitration.

Q. All right. This strike you refer to as the water shortage, I believe you said you had no connection with, is that correct?

A. That is right.

Q. Let's come to the Campbell matter. You were in this meeting in which Grant Mullins, Ellis Lynn and a man named Gibson and Mr. Darst were present, and Mr. Campbell was there, and you said Mr. Campbell did most of the talking, is that correct?

A. I didn't say he did most of the talking. I say he and Mr. Darst did it all.

Q. Nobody else said anything?

Testimony of Grant Mullins

A. Yes, sir.

Q. Who were those committeemen?

650 A. Well, we had several committees, though.

Q. Do you remember anybody in particular being there?

A. Homer Gibson, I remember was one, and Jim Scott and myself.

Q. Did you do most of the talking, Mr. Mullins?

A. I didn't understand you.

Q. I say, did you do most of the talking at that time?

A. Well, I wouldn't state I done the most of it, but I did my part when it was necessary for me to speak in.

Q. Was anybody from the District down there when you were meeting with the company?

A. No, sir.

Q. You don't recall anybody from the District being down there? Mr. Mullins, let me ask you, you had a strike over that vacation pay that you remember?

A. We did.

Q. Do you remember when that took place?

A. Well, in this meeting——

Q. Mr. Mullins, did this take place around the end of the month of July there?

A. How is that?

Q. I say, did this strike, as you remember it over vacation pay, take place around the end of the month of July?

A. It did.

Q. Now, did anybody from the District come down
651 and tell you folks to do that?

A. No, did not.

Q. When you do something like that did people from the District come down and talk to you about it?

Mr. Winston: We object to the leading question.

The Court: I will let him answer.

By Mr. Rayson:

Q. Did they?

Testimony of E. L. Scroggs

A. Not to amount to anything.

Q. Why were you there? You came there to hear and listen to the lecture by Mr. Darst and Mr. Campbell?

A. I came there because I was called. I didn't know I was going to be lectured until I got there.

632 Q. You never said a word?

A. I possibly said a word, yes.

Q. Isn't it a fact that what the issue was that this man Ellis Lynn, who was then the president of the local, accused Campbell of working scab labor; isn't that true?

A. Well, I didn't say in the beginning I knew exactly what the issue was between Mr. Lynn and he, I wouldn't say exactly what the issue was. I said the first I knew——

Q. That wasn't my question. I am not asking you what you knew before you came there.

A. I will say no.

Q. What took place——

A. I will say to your question then no. That wasn't, as far as I know.

Q. You sat there in this meeting, heard them talking, and you tell this Court and jury you did not know what they were talking about?

A. I have been in several meetings I didn't know what all was said.

Q. I am talking about this one meeting. I can imagine that too, but let's confine ourselves to this one meeting. Are you telling the Court you did not know what they were talking about?

A. I didn't know what all they were talking about. I couldn't understand.

633 Q. Did you understand anything they said?

A. I could understand a word occasionally.

Q. There was a rumbling and you couldn't understand?

A. That was it.

Q. When that was over, what did you do; did you attempt to arbitrate or suggest arbitration?

Testimony of Grant Mullins

A: Not too often, they don't. We don't never call them or say anything about it.

Q. Do they meet with you after you are on these strikes?

A. The practice has been, the management always notifies the District if the men are on a wildcat strike.

Q. Do they tell you to keep on striking; does the District tell you to do that?

A. No.

Q. What do they tell you?

A. To get that mine back in operation.

Q. Now do you recall a dispute over Ernest Tabor?

A. I do.

Q. Do you know whether or not there was any strike over that or not?

A. Not to my memory, I don't remember any.

Q. Were you on the committee then?

652 A. I was.

Q. Did you attend any meeting to get Tabor back?

A. I did.

Q. Who was at that meeting?

A. Mr. Fortner, Bob Fortner; Homer Gibson—I can't be positive but whether Jim Scott or Homer Gibson and myself. It was either one of the two.

Q. Was anybody else there from the local union?

A. That was all.

Q. Where was that meeting?

A. That was somewhere down in the mine. We had to talk to Mr. Fortner.

Q. Did he say he would take him back.

A. Not at the time, no, he wouldn't take him back.

Q. Mr. Mullins, when was that meeting with reference to when Tabor was laid off, was that right after he was laid off or some later time?

A. Well, I imagine it was the same day it happened, right about the time it happened.

Testimony of E. L. Scroggs

A. I got up and told them whenever they decided they wanted to make some effort to settle the argument I would come back, and left then.

Q. You were acting as a peacemaker?

A. I usually think I act that way, most of the time.

Q. Let's come to the vacation pay. Do you know who was not getting vacation pay and who was complaining about not receiving the vacation pay?

A. All I know is that there was some group of members of the local union. Specifically any individual's name I couldn't tell you.

Q. I don't ask you for names. I am asking you for a group as a classification, as to whether or not it was a group of men who were not then employed; do you know that?

A. I don't believe I got it that straight when I was down there because the question that was brought up to me was the question of paying these men or holding the vacation pay for some debts.

Q. When you say these men, what group; you said
634 a group or groups?

A. Whatever group they were wanting it. All we were discussing was in generalities of the group that were wanting it.

Q. What group was that? I don't mean names. What classification would that come under, men working or men laid off?

A. Well, I couldn't tell you. We were discussing the men that were entitled to his vacation and whether he was laid off or was not did not enter into the picture with me.

Q. Do you mean to tell the Court that you, a representative of the District, a trained man, sat in on this meeting and did not know what you were talking about?

A. I did know what we were talking about.

Q. Tell us.

Testimony of E. L. Scroggs

A. I told you the only question that I was discussing there that was brought to my attention or have any information on was the question whether the company could hold this vacation pay against debts or not.

Q. You don't know what classification it was in?

A. No.

Q. Let's take up the credit—did you suggest that that matter be arbitrated?

A. Did I suggest that the credit be arbitrated?

Q. Yes.

635 A. Well, I wouldn't think I suggested it.

Q. Let's take up the credit, the strike that arose over credit. You attended that meeting. What was the issue there?

A. The information I had on that was that the company had been advancing some credit to members of the local union.

Q. Were the members of the local union that were receiving credit employed or unemployed?

A. I would suggest in getting credit it was unemployed, possibly.

Q. Is there any obligation of the company under the contract to furnish credit to anyone?

A. I don't know about the obligation—

Q. Is there any provision in the contract to furnish credit to anyone?

A. Not in the contract, it doesn't mention the credit.

Q. Then why were you called in?

A. Ask Mr. Darst, he could better answer that.

Q. No, I am asking you.

A. Well, he called me, that is the only thing I can say. He called me on the basis of trying to reach an agreement.

Q. What did you do after you got there, Mr. Scroggs?

A. I listened to the discussion.

Testimony of E. L. Scroggs

Q. Did you tell them at any time that there was no
636 contractual provision or no obligation on the part
of the company to pay this?

A. I don't believe I told them because I don't think any
body in that crowd that was ignorant, they knew it wasn't.

Q. To extend credit?

A. That's right. I took everybody knew it wasn't a
contract matter. It was just a discussion between the em-
ployees and the employer.

Q. But the men were out on strike, that is correct,
isn't it?

A. The men were out on strike, I don't know whether I
could definitely say they were out at that particular time
or not, but it seems like to me they weren't at that par-
ticular time.

Q. That they were what?

A. Wasn't. It strikes me that the mine wasn't on strike
at that particular time.

Q. You are not certain about that?

A. I don't know as I can be definite about it.

Q. Mr. Scroggs, you knew Mr. Swisher, you stated, and
you recall the strike that occurred in connection with his
operation?

A. I believe I stated I didn't know anything about that.

Q. You don't know anything about that?

A. No, sir, I was not a field worker.

637 Q. You don't know anything about that picket line
being out there to keep his men from going up on
the mountain?

A. No. Nothing no more than what I mentioned to the
other counsel, rumors.

Q. You attended these various meetings and about the
sum and substance of what you did was, according to your
testimony, tell the men to work it out on their own, is
that right?

Testimony of Arch Mooneyhan

A. No, sir, I did not say that.

Q. What did you tell them, to go back to work?

A. When I am called in to attend a meeting, that is one point of the contract that I take for granted when I am called in because of the contracting parties wishing to put into effect that clause in the contract, that I tried to negotiate or settle the matter.

Q. What method did you use to settle it?

A. Well, the only—

Q. To arbitrate. You are familiar with the contractual provision that the machinery as set out in the contract shall be used exclusively for settling these disputes, you are familiar with that, aren't you?

A. I think so, yes.

Q. And that was not followed, was it?

A. What?

Q. Those methods that were prescribed, were not followed?

638 A. I would say they were, yes.

Q. But the men were on strike, weren't they?

A. Well, the men may have been on strike but that did not prohibit the contracting parties from discussing the question.

Mr. Milligan: All right.

Mr. Kramer: That is all.

(Witness excused.)

ARCH MOONEYHAN,

called as a witness by and on behalf of the cross-defendants, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Rayson.

Q. Would you state your name, please, sir.

A. Arch Mooneyhan.

Testimony of Arch Mooneyhan

Q. Arch Mooneyhan?

A. Yes, sir.

Q. Where do you live, Mr. Mooneyhan?

A. St. Charles, Virginia.

Q. Are you employed at the mines there?

A. I work up at the Little Coal Company.

Q. Have you ever worked for Benedict Coal Corporation?

A. No.

639 Q. Are you a member of the Benedict local there?

A. Yes, sir.

Q. I believe you are president of the local at this time?

A. Yes.

Q. Mr. Mooneyhan, I just want to ask you two or three questions. Do you know a man by the name of Jim Scott?

A. I do.

Q. Have you had any occasion to talk to him during the last few weeks?

A. Nothing only to speak to him.

Q. Have you had any occasion during the last two or three weeks, or at any other time, to discuss this lawsuit with him?

A. Sure haven't.

Q. Have you at any time threatened or implied to him that he would have trouble with the men down there or with the Benedict local if he came down here and testified?

A. Sure haven't.

Mr. Rayson: You may ask him.

Cross-Examination, by Mr. Winston.

Q. You are president of the local there on the Benedict property at this time?

A. Yes, sir.

640 Q. Did you know that Jim Scott was coming here to testify?

Testimony of Grant Kennedy

A. I didn't know anything about it. I never did discuss it with him or talk to him about it.

Q. Did any of the people in your local know that Jim had previously given a pre-trial deposition in this case?

A. Not that I know of.

Q. Do you know Clint Hughes?

A. Yes, sir.

Q. Have you talked to Clint Hughes about this case in the last few months?

A. I sure haven't.

Q. How often do you see Clint Hughes?

A. About every day.

Q. You and your local knew this case was coming up, didn't you? In fact, lots of people have been down to talk to various people to see what they knew about it?

A. Not as I knowed of. I don't hang around down there too much.

Q. Where do you live?

A. St. Charles.

Q. You don't know anything about this suit coming up?

A. Except that one at Wise, that is all I ever heard about.

Q. I meant this particular one?

641 A. I didn't know about this one.

Mr. Winston: Thank you, sir.

Mr. Rayson: That is all.

(Witness excused.)

GRANT KENNEDY,

called as witness by and on behalf of the cross-defendants, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Hardin.

Q. What is your name, sir?

A. Grant Kennedy.

Q. How old are you?

Testimony of Grant Kennedy

A. Forty-five.

Q. Where do you live?

A. St. Charles, Virginia,

Q. Are you a member of the local union at St. Charles and Benedict?

A. Yes, sir.

Q. And you know Jim Scott?

A. Yes, sir.

Q. Any relation of his?

A. He married my sister.

Q. Have you seen him lately?

A. I haven't saw him in about three weeks.

642 Q. Where did you see him about three weeks ago?

A. At his home.

Q. What was the occasion of your being there?

A. I was up there visiting my sister.

Q. And visiting your sister?

A. Yes.

Q. Did you ever talk to Mr. Scott, your brother-in-law, in regard to this suit down here?

A. No, sir.

Q. Now what was ever said by you, if anything, to Scott?

A. Not anything.

Q. Did Scott ever mention it to you?

A. No.

Q. I will ask you whether or not you ever at any time made any threat to Mr. Scott?

A. No, sir.

Q. Did you at any time ever tell him that he would have trouble getting back in the union if he testified?

A. No, sir.

Q. Where do you live now, sir?

A. Right at St. Charles, what is called St. Charles. I live out about three miles west of St. Charles.

Mr. Hardin: Cross-examine.

Testimony of Grant Mullins

643 **Cross-Examination,** by Mr. Winston.

Q. Mr. Kennedy, you are a member of the local union there on the Benedict property?

A. No, sir. I don't live in the camp.

Mr. Kramer: I didn't understand that?

Mr. Winston: I asked him if he was a member of the local union.

Mr. Kramer: What was your answer to that question?

Mr. Winston: Of the local union?

Mr. Kramer: Are you a member of the Benedict local?

The Witness: Yes, sir.

By Mr. Winston:

Q. Jim Scott is a policeman in St. Charles, isn't he?

A. Yes, sir.

Q. Has he had occasion to arrest you?

A. No.

Q. He never has?

A. He arrested me one time.

Q. Just once?

A. Yes, sir.

Mr. Winston: That is all.

Mr. Hardin: Come around.

(Witness excused.)

644 **GRANT MULLINS,**

called as a witness by and on behalf of the cross-defendants, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Rayson.

Q. Would you state your name, please.

A. Grant Mullins.

Q. Mr. Mullins, how old are you?

A. I am 61.

Testimony of Grant Mullins

Q. Sixty-one?

A. Yes, sir.

Q. Are you working now?

A. No, sir, retired.

Q. When did you retire?

A. Well, something about a year ago. I guess about a year ago.

Q. Mr. Mullins, where did you work before you were retired?

A. The Benedict Coal Corporation.

Q. For the Benedict Coal Corporation?

A. Yes, sir.

Q. How long had you worked there?

A. Well, I retired with a work record of 23 years and eight months, if I am not mistaken.

645 Q. Had you worked for Benedict during the period of 1950 through 1953, Mr. Mullins?

A. I did.

Q. Were you a member of the Benedict local union during that time?

A. Were I in the local?

Q. Yes, sir. Were you a member of the United Mine Workers of America?

A. Yes, sir.

Q. And you belonged to the Benedict local, I believe?

A. Yes, sir.

Q. Mr. Mullins, did you hold any position with the local union there?

A. I was mine committee.

Q. You were on the mine committee?

A. Yes, sir.

Q. Did you live at the camp?

A. No, sir.

Q. Whereabouts do you live?

A. I live out from the mines. The mines were, I reckon, about 15 or 16 miles.

Testimony of Grant Mullins

Q. You live about 17 or 18 miles from the mine?

A. Yes.

Q. Did you live that far away from the camp all the time?

646 A. No, sir, not all the time...

Q. How long have you lived there some 18 miles from the mines?

A. Well, 14 or 15 years.

Q. Can you hear me all right, Mr. Mullins?

A. What?

Q. I say, can you hear me all right?

A. I don't hear too good. Just a little bit louder, if you please.

The Court: Mr. Mullins, the jury wants to hear what you say and if you will turn your voice so they can hear you I believe it will help.

The Witness: Okeh.

By Mr. Rayson:

Q. All right, sir. Mr. Mullins, do you recall a work stoppage or strike down at the Benedict in April of 1950 over some seniority question, when some of those upper seams were being closed down?

A. Yes, sir, I do.

Q. Were you on the committee at that time?

A. Yes, sir, I were.

Q. Now did you take part in any meetings with the company over that matter?

A. I did.

Q. Do you remember what day of the week that
647 meeting was on?

A. I do not.

Q. Do you remember who all was there?

A. That would be pretty hard to recall.

Q. Was Mr. Darst there?

A. Yes, sir.

Testimony of Grant Mullins

Q. Was anybody else from the company there that you remember?

A. Yes, sir.

Q. Who was there?

A. Bob Fortner.

Q. Bob Fortner?

A. Yes, sir.

Q. Do you remember anybody else?

A. Charlie Fritz.

Q. Anybody else you remember?

A. I couldn't say.

Q. Was Mr. Scroggs down there, Mr. Mullins; do you remember him being there?

A. No, sir. Mr. Scroggs, to my recollection, wasn't present in this meeting.

Q. What was your discussion about during that meeting?

A. Seniority question was our argument in the meeting.

Q. Well, did you get the matter settled there? Did you work something out with the company on that day, Mr. Mullins?

648 A. Well, I can't state definite whether we did or not, not on that day.

Q. Did you go back to work?

A. What we worked out, the way I remember it, we called the local together and reported our agreement we had reached and then returned to work.

Q. You say you did not live at the Benedict Camp, is that right?

A. That's right.

Q. Then I don't suppose you know whether or not they run out of water during that summer of 1950 or not?

A. Yes, sir, I know about it.

Q. Do you know whether there was a strike over that?

Testimony of Grant Mullins

A. I don't know too much about that strike. That did not involve me. That was a different pit.

Q. Did not involve you, it was a different pit; did not involve your committeemen?

A. No, sir. Each pit has their own committee.

Q. In other words, it was not your place.

A. Right.

Q. Did you attend any meeting of the company over that or anything like that?

A. Not as I recall, I wasn't in on that question.

Q. All right. Now do you remember a dispute over Jim Collingsworth?

649 A. No, sir, I wasn't in that case.

Q. Were you and Collingsworth working in the same mine, same seam of coal?

A. No, sir, not at the time of the trouble you are speaking of.

Q. Do you know anything personally about this trouble?

A. No, sir.

Q. Did you attend any meeting over that?

A. No, sir.

Q. Now in the summer of 1951 it is said there was a strike over vacation pay. Do you recall any dispute over vacation pay?

A. I do.

Q. Did you take part in any meeting on that matter?

A. I did.

Q. Did you meet with the company about it?

A. Yes, sir.

Q. Meet with Mr. Darst about it, here?

A. Yes, sir, met with the management, Mr. Darst and Mr. Fortner.

Q. Who all was with you when you were meeting with them? Who all was with you, Mr. Mullins; were the other members of the committee there?

Testimony of Grant Mullins

Q. Were you in on the meeting when the company said they would take Tabor back?

A. I was not.

Q. I will ask you, Mr. Mullins, if you were down to Ellis Lynn's house a couple of days after Tabor was discharged?

A. No, sir, I wasn't.

653 Q. Were you notified of that meeting down there?

A. I was.

Q. Why didn't you go?

A. I live out of the camp and the other men lived in the camp, and I called the local president about it, it would be well for me to go on to the house, and he said they just as soon have an outside talk and not a scheduled meeting, n. et at Lynn's and have a talk.

Q. The committeemen in town attended it and you that did not live in town did not attend it?

A. That is correct.

Q. Did Tabor go back to work?

A. He did.

Q. When did he go back to work, do you know?

The Court: Is there any dispute about that; any dispute about Tabor going back to work?

Mr. Winston: No, your Honor.

Mr. Rayson: Monday, November 6?

Mr. Winston: The strike was on November 2nd and November 7th, and then Tabor went back to work after that. I don't know the date, the particular date. I think it was the 8th.

Mr. Rayson: We cannot stipulate that, your Honor. It is my understanding that he went back to work on the 6th.

654 The Court: All right.

Mr. Rayson: The next regular shift.

Mr. Winston: The 6th?

Testimony of Grant Mullins

Mr. Rayson: The 3th.

The Court: What does it matter so far as this issue in this lawsuit?

Mr. Winston: Not a thing.

Mr. Rayson: It is this, your Honor, they are claiming that there was a strike on the 7th over Ernest Tabor being discharged, and if Ernest Tabor went back to work on the 5th —

The Court: Do you say there was not any strike?

Mr. Rayson: This is the one on which we dispute the fact there was a strike.

Mr. Kramer: This is the one I mentioned this morning.

The Court: All right.

By Mr. Rayson:

Q. Do you recall the dispute over two men by the name of Anders and Roark?

A. Yes, sir, I do.

Q. Did you meet with the company about that matter?

A. I did.

Q. Anybody from the District come down with you?

A. No, sir.

655 Q. You don't recall whether or not they did?

A. Later in the picture but not in the first meeting.

Q. Did you at any time meet with anybody from the District and the company over Anders and Roark?

A. Not as I recall.

Q. You don't recall?

A. No.

Q. Mr. Mullins, do you know whether or not any grievance was filed with the board over Anders and Roark?

A. Yes, sir, there were.

Q. Do you know who filed that with the board?

A. I do.

Q. Who did?

A. The mine committee.

Testimony of Grant Mullins

Q. Were you on that committee?

A. Yes, sir, I were. Homer Gibson and Jim Scott.

Q. What happened to that matter that went to the board, what happened to that case?

A. I don't know.

Q. Do you have any definite recollection about it, Mr. Mullins?

A. There was a cross there some way between the management, they had settled the case somewhere and they wrote it was settled. At a later date the case appeared again on the settlement.

656 Q. It was settled out some way, is that it?

A. I didn't understand you.

Q. I say, it was settled in some way, is that right.

A. That wasn't true to start with. They worked it out later, afterwards.

Q. Mr. Mullins, do you remember a man by the name of M. M. Campbell?

A. Well, I remember a fellow we called Mr. Campbell. I couldn't state his initials.

Q. What did Campbell do down there?

A. He appeared with the company on the construction work, to do construction work. Build some kind of something, I just don't remember what it was.

Q. Did you ever talk to Campbell about signing a contract with the United Mine Workers?

A. Not as long as he done construction work, he wasn't covered under the contract. I had no right to interfere, but the date they moved in, when the work was covered, I talked to him about it.

Q. What did he have to say about it?

A. He seemed to be well tickled over it. We were discussing about his men becoming members of our organization, it satisfied him.

Q. Were his men taken into the local?

Testimony of Grant Mullins

A. They were.

657 Q. Did Campbell sign a contract?

A. Yes, sir, later.

Q. Did you go with Campbell to Norton to the office of District No. 28 the day he signed the contract?

A. We followed the same road, but I wasn't with him. He was in one car and I was in another.

Q. Tell us how you got to Norton.

A. Well the morning we went to Norton, Mr. Lynn, the local president, and me being committee, we had some reason to go to the District.

Even before I had talked with Mr. Campbell, just personally, me and him, he asked me if he could become a member of the organization, and I said, "You sure can if you do any work. It is too deep for me, you can go see the District president and he can advise you."

"When can I go?"

I told him that being president of the local I was going in the morning and, "You can go along with us, if you wish."

"I will do that."

We prepared to take him with us and when we stopped to pick him up he said, "No, me and my boy will go in my car and we might not come back when you do."

We drove in front as far as Big Stone Gap, and Mr. Lynn stopped the car at Mr. Scroggs' house and
658 Mr. Campbell drove up behind us in his car and we got out and stood in the road and had a friendly talk.

Q. Who had that talk there, if I may interrupt you, you and Campbell talked?

A. No, sir.

Q. Who was talking when you stopped there in front of Mr. Scroggs' house?

A. Mr. Lynn went up to Mr. Scroggs and left me in his car alone. Mr. Campbell come up behind us and his boy,

Testimony of Grant Mullins

we got out in the road and we all three talked, Mr. Campbell and his boy and myself.

Q. Go ahead and explain, Mr. Mullins.

A. And before Mr. Lynn returned to his car, he leaves, goes on up toward Norton. Mr. Lynn returned, and we drove on to Norton and the next place I remember meeting with Mr. Campbell was somewhere about the District office in Norton, down in front on the street.

We go upstairs together and took him into the president, Mr. Condra, District president, and they had a friendly talk. He asked him a question and he told him, sure, he would be glad to sign a contract and did sign a contract on that date.

Q. You saw him sign the contract at that time?

A. I was present when he signed it.

Q. Was there any bitterness or unfriendliness at
659 that meeting? •

A. Not a word. Everything was friendly.

Q. Do you recall any strikes over M. M. Campbell that any way involved him?

A. No, sir.

Q. You don't recall any?

A. No.

Q. Now, do you recall a strike on May 18, 1953, Mr. Mullins?

A. I do not.

Q. You don't have any recollection of it at all?

A. No, sir.

Q. Mr. Mullins, after Mr. Campbell signed that contract, did you ever have any occasion to discuss with his men whether or not Campbell was paying his men the scale?

A. Not as I recall.

Mr. Rayson: All right.

Testimony of Grant Mullins

Cross-Examination, by Mr. Milligan.

Q. Isn't it a fact that you were on the picket line, a member of the picket line on May 18 when the Big Mountain operation was picketed, you were right there, one of them?

Mr. Kramer: Talking about Campbell or Big Mountain?

Mr. Milligan: I am talking about Big Mountain, Swisher.

660 By Mr. Milligan:

Q. Can you hear me?

A. No, I don't know anything about it.

Q. You can hear the question, can't you?

A. I understand it, yes.

Q. What is your answer?

A. I don't remember anything about no picket line, never saw one.

Q. Now you were in a meeting in connection with the closing of one of the mines in April, 1950, and that meeting was in Mr. Darst's office. Mr. Fortner was there and Mr. Fritz over there; you remember that, don't you?

A. I remember that.

Q. You were right there.

A. Yes.

Q. And you say Scroggs was not there?

A. I won't say that.

Q. You did.

A. He could have been, but I am calling the men I dealt with, that is all I can recall. There may have been others sitting in, I don't remember.

Q. Coming back to the Campbell matter. Are you sure that you did not ride over there with Campbell in an automobile?

661 A. I am positive as I am sitting here I wasn't in Campbell's car at all, never was.

Q. Isn't it a fact that Mr. Campbell had a transit or

Testimony of Grant Mullins

surveyor's instrument and you got curious about it and he took it out and set it up and let you look through it?

A. He did set it up in the road, and I wasn't in the car.

Q. Where was it?

A. Big Stone Gap, while parked waiting for my buddy to return back from Lynn's house.

Q. He trained it on the mountain, the big tree.

A. Yes.

Q. You looked all around over the country, is that right?

A. That's right.

Q. What, else was done on that occasion? Isn't it a fact on that occasion that you helped change a tire on Mr. Campbell's car?

A. I did not.

Q. Someone did, didn't they?

A. Not as I know of.

Q. You don't remember about that?

Mr. Kramer: He didn't say he didn't remember. He said not as he knows of.

By Mr. Milligan:

Q. Mr. Mullins, you were in the office when Mr. Campbell signed this contract?

A. I were.

Q. After you left the office did you tell Mr. Lynn Mr. Campbell had signed up?

A. Well, he was there. He knew about it. I don't know whether I told him. We might have talked about it.

Q. Mr. Lynn has good eyesight, as far as you know?

A. I imagine he does.

Q. And he was right there?

A. I don't know whether he was right there where he signed. He had the secretary sign it but not before Mr. Condra.

Q. What is Mr. Lynn's position or was his position with the union?

Testimony of Grant Mullins

A. Local president.

Q. And that was the purpose of you and Mr. Lynn going over to the District office, to get Mr. Campbell to sign up, wasn't it?

A. No, sir. As I stated, we were going anyhow.

Q. I understand that but that was one of your purposes?

A. No, sir.

Q. You did not go for that reason at all?

A. No.

Q. You are positive about that?

A. That's right.

663 Q. Mr. Lynn went for that purpose, didn't he?

A. I stated there we had other causes.

Q. I asked you, Mr. Lynn went over for, one of the purposes of his visit was to sign Mr. Campbell up?

A. Not as I know. He never did discuss that with me that was his reason.

Q. What was your office in the local at that time?

A. Committee.

Q. You were the committee?

A. Yes.

Q. You do know as a fact that the Benedict local wouldn't let Campbell's men join?

A. No, sir. They invited them to come in, we wanted them in.

Q. In the local?

A. Right.

Q. And you know one of Campbell's questions was that he wanted a separate local?

A. No, that was never mentioned in our discussion.

Q. You don't remember that?

Mr. Kramer: He said not mentioned.

Mr. Milligan: I beg your pardon?

By Mr. Milligan:

O. Now Mr. Swisher, did you know anything about that?

Testimony of Dana Muncey

A. Who is that?

664 Q. Swisher, did you know Ura Swisher?

A. I didn't know too much about Swisher. I knowed of him being there.

Q. You did not know anything about the Collingsworth problem?

A. No, sir.

Q. On the Tabor matter, wasn't it a fact that this grievance that was filed was in an effort to collect the two days pay that these men were off?

A. We never filed any grievance on Tabor.

Q. That was what it was.

A. Not on Tabor. We never filed a grievance.

Q. I am sorry, Roark and Anders. Wasn't that the ones you filed the grievance on, to get their money for those two days they were off, or three days, whatever it was?

A. Two days, what we filed a grievance on.

Q. That was after the men had gone back to work?

A. Right.

Mr. Milligan: That is all.

Mr. Rayson: That is all.

(Witness excused.)

(A short recess was had.)

665

DANA MUNCEY,

called as a witness by and on behalf of the cross-defendants, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Rayson.

Q. Would you state your name, please, sir.

A. Dana Muncey.

Q. Mr. Muncey, where do you live?

A. I live in St. Charles.

Testimony of Dana Muncey

Q. You live in the town of St. Charles or—

A. In the Benedict camp.

Q. What age man are you?

A. Forty-four.

Q. Have you lived in the Benedict camp very long?

A. Well, about ten years, I guess.

Q. You work for the Benedict Coal Corporation.

A. I did.

Q. Are you a coal miner now?

A. Yes.

Q. Who are you working for now?

A. Redwine—rather the Benvir Coal Company.

Q. Is that the same mine you used to work in for Benedict?

A. Yes, sir.

666 Q. During this ten year period have you been a member of the United Mine Workers, the local union at Benedict?

A. Yes, sir.

Q. I will ask you if you have held any office in that local union, Mr. Muncey?

A. Yes, sir. I have been vice-president and I have been president.

Q. Do you remember when you were made vice-president of that local union?

A. I couldn't give the exact date on it. Some time in 1952.

Q. I will ask you if you were vice-president of the local union at the time a man named Ernest Tabor was discharged?

A. Yes, sir.

Q. Do you know anything about that dispute?

A. Well, yes.

Q. Did you have any occasion to talk with a man named Robert Fortner about that discharge?

Testimony of Dana Muncey

A. Yes, sir.

Q. Who is or who was Robert Fortner?

A. He was general mine foreman.

Q. Is he still living, by the way?

A. Yes, sir.

Q. Where did you have this talk with Robert Fortner?

667 A. On Ellis Lynn's porch.

Q. Do you remember the day of the week that conversation took place?

A. Well, no, I couldn't say.

Q. To refresh your memory was it on a Sunday afternoon?

A. Could have been. I wouldn't say for sure.

Q. Now, you were on Ellis Lynn's porch, you say?

A. Yes, sir.

Q. Who was with you there?

A. Mr. Lynn.

Q. Just the two of you?

A. Yes.

Q. Where was Fortner?

A. He came up the road and we invited him in to talk.

Q. Did you talk to him about anything particular?

A. We talked to him about Tabor being discharged.

Q. What was that conversation as best you remember it?

A. Well, we asked him if there would be any way that he would have of putting him back to work, and he didn't give us much satisfaction that he would.

Q. What was your attitude in that matter; how did you feel about Tabor in your talk with Fortner there?

A. Well, I felt the man needed to work. He had a big family.

Q. He is a man of family, this Tabor?

668 A. Yes, sir.

Q. Did Fortner say he would take him back at that time?

Testimony of Dana Muncey

A. No, not at that time he didn't.

Q. What did he do?

A. He went on home and called Mr. Lynn on the telephone.

Q. When did he call Lynn on the telephone?

A. About ten minutes after we were talking to him on Lynn's porch.

Q. Where does Mr. Fortner live with reference to Mr. Lynn's house?

A. He lived about 100 yards from him at that time.

Q. He lived at the camp, too?

A. Yes.

Q. Did you talk to Fortner on the telephone?

A. No.

Q. Did Mr. Lynn come back and make a report to you of this telephone conversation?

A. Yes, sir.

Q. What did he say Fortner had to say?

A. He said he had decided, if they get hold of Tabor and get him down there he would talk to him, and advised us to get the mine committee and let him talk to them.

Q. Did you get the mine committee?

A. Mr. Lynn went and got the mine committee and
669 I went after Tabor.

Q. You went after Tabor?

A. Yes, sir.

Q. Did you meet with Fortner after that?

A. Yes, sir.

Q. That very day?

A. That same night. About 9 o'clock in the night.

Q. Where was it that you met that time?

A. Right across the road in front of Lynn's house.

Q. What is there, just a vacant lot across there?

A. Yes, sir.

Q. What was the talk in that meeting there across from Lynn's house with Tabor present?

Testimony of Dana Muncey

A. Well, he had discharged Tabor for being an un-regular worker, I suppose, mostly.

Q. Did Fortner agree to take Tabor back?

A. He told him he would take him back if he would promise him he would work regular.

Q. Did Tabor work regular after that?

A. Yes, sir, he did.

Q. Did Fortner take him back that night?

A. Yes, sir.

Q. Do you know whether Tabor worked the next day or not.

A. I think so.

670 Q. Do you recall any work stoppage over that matter, any strike or anything of any kind?

A. No, there wasn't no strike.

Q. Now, were you an officer of the local union during the summer time of 1951?

A. Well, I wouldn't say whether I was in '51 or not.

Q. Let me ask you this question. Were you an officer of the local union when there was a dispute over vacation pay, where the company was trying to hold some money back on account of store credits or something of that sort?

A. No.

Q. You were not a local union officer at that time. Do you remember that particular dispute?

A. No, I don't know anything about it.

Q. Did you attend any meetings over anything like that?

A. No, sir.

Q. Had you been an officer at any time prior to that, any time before that vacation matter?

A. No, I wouldn't think I had.

Q. In other words, you were an officer after that time?

A. Yes.

Q. Going back to the Tabor matter for a minute, Mr. Muncey. Was there anybody from District 28 involved in that matter?

Testimony of Dana Muncey

A. No, sir.

671 Q. Just between you and the committee and Fortner, is that right?

A. That is all.

Q. Do you have any recollection of the dispute over the discharge of Jap Anders and Mel Roark?

A. No.

Q. Do you remember it at all?

A. Just remember it happening; don't know anything about it.

Q. Did you attend any meeting over that particular matter?

A. No.

Q. I see. Now, Mr. Muncey, do you remember a strike or dispute or something that started on May 18, 1953?

A. Yes. They had a stoppage over royalties not being paid.

Q. Let me ask you, what position did you have with the local union at that time?

A. I was president at that time.

Q. You were president?

A. Yes, sir.

Q. Did you have any understanding at that time that the company was meant to speak to you about royalty payments?

A. Yes, sir.

Q. When was the company meant to advise you about that?

672 A. Supposed to be advised by the 18th.

Q. Had you been advised as to whether the company had made any royalty by the 18th of that month?

A. No, sir.

Q. Darst had never talked to you about it?

A. No.

Q. What did you do on that morning?

Testimony of Dana Muncey

A. Well, I just told the men that the royalty hadn't been paid and hadn't been reported paid, and they all went home.

Q. After you went home that morning did you later have any occasion to speak to Darst about this, and I am speaking of Mr. Guy B. Darst?

A. Yes, sir.

Q. Do you remember when that was?

A. It was on the same day.

Q. What part of the day was it?

A. It was along in the evening, afternoon.

Q. Where did you see him?

A. In the company store.

Q. Did you speak to him there?

A. Yes.

Q. What was the gist of that conversation; what were you talking about?

A. He came in the store and run on me in there,
673 and he said, "Well, the royalty is paid. I just neglected, forgot to tell you."

Q. Did you have any other talk with him on that time?

A. No.

Q. Now after he told you that did you do anything with reference to a meeting of the local union?

A. Yes.

Q. What did you do?

A. We got hold of the committees and called a meeting the next morning and advised them to go back to work, that the royalty was paid.

Q. And did the men vote to go back to work at that meeting?

A. Yes.

Q. And did they go back to work the next morning?

A. They went out to work and the company decided they wouldn't work, I reckon. They changed the sign.

Testimony of Dana Muncy

Q. Did that have anything to do with a man named M. M. Campbell, a contractor or some sort of construction worker, around there?

A. No, sir.

Q. Not M. M. Campbell but Ura Swisher. Did that strike have anything to do with Swisher's employees or the Big Mountain Coal Company?

A. No, sir.

674 Q. Were you people striking over that?

A. No.

Q. Do you know of anybody or did you personally picket anybody up there at the Big Mountain Coal Company?

A. No, sir.

Q. Do you know of anybody that did?

A. No, I don't.

Q. Before you people went out on strike the morning of the 18th, had you been told by the District to do that?

A. No.

Q. Had the District ever in your opinion directed or advised you to go out on one of these local strikes?

A. No, sir.

Q. What did they do when you did go out one of these strikes?

A. They would advise us to get back to work.

Q. Send somebody down there and tell you to do that?

A. Yes, sir.

Q. Do you have any recollection of a man named Campbell down there?

A. No, sir.

Q. You don't recall Campbell coming in and working on a construction job there?

A. I know he worked there but that was all.

Q. Did you participate in any meeting over Campbell?

Testimony of Dana Muncey

675 A. No.

Q. Did you know if there were any work stoppages or strikes over Campbell?

A. Not that I remember, sir.

Q. Now in the summer of 1950, Mr. Muncey, it is said there was a strike over a water shortage in the camp. Do you have any recollection of that?

A. No, sir.

Q. Let me ask you, did you live in the camp back in the summer of 1950?

A. Yes.

Q. The early fall, around September?

A. Yes, sir.

Q. Do you recall whether or not you ran out of water that summer?

A. We were out of water.

Q. Do you recall whether or not the men quit work over it, some of the men?

A. Yes.

Q. Did some of the men quit work over that?

A. Yes.

Q. Were you an officer of the local at that time?

A. No.

Q. Did you meet with the company over that matter?

A. No, sir, I didn't.

676 Q. Did the men finally go back to work?

A. Yes, they finally went back to work.

Q. Do you know why they finally went back to work?

A. They fixed some water in the camp.

Q. Do you remember any meeting with District officers over that?

A. Not me.

Q. You did not meet with them?

A. No.

Mr. Rayson: You may ask him.

Testimony of Dana Muncey

Cross-Examination, by Mr. Winston.

Q. Did I understand you, Mr. Muncey, when you talked to Robert Fortner on Ellis Lynn's porch you did not know what date that was, is that what you said?

A. How is that?

Q. When you talked to Robert Fortner on Ellis Lynn's porch about that Tabor matter, you don't remember what day that was?

A. No, I don't remember the day it was.

Q. There had been a strike going on, hadn't there?

A. No, there was no strike.

Q. Never was any strike over Mr. Tabor's dispute?

A. No.

Q. You are sure of that?

677 A. Yes, sir.

Q. Was there a work stoppage over Tr. Tabor's discharge?

A. No, sir.

Q. You say all there was about Tabor was that you all asked Fortner to put Tabor back to work and he did not give you much satisfaction, and later on Fortner told Mr. Lynn over the telephone he would take him back?

A. Told him he would talk to him, get hold of him.

Q. Have a conference and he went on back and that was all there was to it?

A. Yes.

Q. You also testified about this strike of May 18, 1953. What time did you go to work that morning?

A. On May 18?

Q. Yes.

A. We went out to work at 7 o'clock.

Q. Did you go into the mines?

A. No, sir.

Q. You never did go to work?

A. Never did go in.

Testimony of Dana Muncey

Q. That was 7 o'clock in the morning?

A. Yes, sir.

Q. How long after that was it you say you saw Mr. Guy Darst?

678 A. Well, I would say it was after noon, somewhere around 3 o'clock, I guess, in the evening.

Q. During that time there were some pickets over there and stopping Mr. Swisher's men from going up to work, weren't there?

A. I never seen none.

Q. You did not see any pickets?

A. No.

Q. Did you stop any of Mr. Swisher's men from going to work?

A. No, sir.

Q. Did you have any dealing with Mr. Swisher's men at that time?

A. No.

Q. Were you served with the injunction that was gotten out on the 27th?

A. Yes.

Q. A copy served on you?

A. Yes.

Q. You hadn't done anything before that with Mr. Swisher's men to interfere with them?

A. No, sir.

Q. There was a dispute there, wasn't there, Mr. Muncey, about whether or not Mr. Swisher's men would join the Benedict local?

679 A. Yes, there was a dispute, something over there.

Q. You all wanted the men in your local, didn't you?

A. Yes, we invited them in.

Q. And they did not want in your local. One reason you had so many strikes they wanted to go up there and work and not be involved in your strikes.

Testimony of Dana Muncey

A. I don't know.

Q. They didn't want in.

A. They talked like they did but they never did come.

Q. They talked like they did want in?

A. Yes.

Q. Who was it said they didn't want in?

A. They never did say they didn't want in.

Q. Did they come in your local?

A. No.

Q. They talked like they wanted in but yet they never did come in your local, is that what you are telling us?

A. That is right.

Q. What was the dispute over if they talked like they wanted in your local?

A. I couldn't tell you what the dispute was.

Q. But there was a dispute?

A. I imagine there was.

Q. You say you did not see any picket line but you knew there was a picket line stopping those men from
680 working, didn't you?

A. No, sir.

Q. During the time you all were down in May there at the Benedict mine, it is a fact Mr. Swisher did not operate, did he?

A. Yes, sir, he was working.

Q. He was working during that period of time?

A. He might have been one day on account of a breakdown they say.

Q. Not what they say but what you know, sir. Do you know what kept him from working?

A. No. He worked all the time except that one day I know of, and I didn't go to work that day but I think they had a breakdown.

Q. Then your statement is that Mr. Swisher worked during the week of the 18th of May and following?

Testimony of Dana Muncey

A. Yes, sir.

Q. You are sure of that?

A. Yes, my recollection is.

Q. Did the Benedict tipple work during that time that you all were on strike?

A. Well, I wouldn't say whether the tipple worked or not.

Q. Everybody want on that strike, didn't they, at Benedict? I mean, it was not a case of a part on
681 strike. All of the local struck, didn't they?

A. I wouldn't say whether the tipple did or not.

Q. Answer my question. Didn't all of the local strike?

A. I don't know whether the tipple struck or not, they belonged to the local.

Q. The question was, didn't all of your local go on strike?

A. If they didn't strike they weren't.

Q. I am sorry, I didn't hear your answer.

A. I say, if the tipple run they did not.

Q. In other words, you don't know, sir?

A. No, sir. I wouldn't say whether the tipple run or not.

Q. What office did you have in the local at that time?

A. I was present.

Q. And didn't you know who was striking and who wasn't, being president of the local?

A. I knowed who was but I didn't know who wasn't.

Q. But you did know who was?

A. Yes, sir.

Q. But you don't know about the people that worked on the tipple.

A. No, sir.

Q. And they were members of your local, weren't they?

A. Yes, sir.

682 Q. Did you ever have a strike up there where part of your local worked and part didn't?

Testimony of Jeff Anders

A. Yes, sir, we have had that.

Q. Wouldn't you get angry with those that were still working?

A. No.

Q. You wouldn't. When did such a strike as that occur?

A. I couldn't call the date of it.

Q. Could you tell us what it was over?

A. No, sir, I couldn't do that.

Q. Where part struck and part didn't.

A. No, sir, I couldn't tell you that.

Mr. Winston: Thank you, sir.

(Witness excused.)

JEFF ANDERS,

called as a witness by and on behalf of the cross-defendants, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Kramer.

Q. Your name is Jeff Anders?

A. That's right.

Q. Where do you live?

A. St. Charles.

683 Q. St. Charles, Virginia?

A. Yes.

Q. What do you do?

A. Lay track.

Q. That is, in coal mines?

A. Yes.

Q. You are a coal miner and your specific job is track layer?

A. Yes.

Q. How long have you been doing that kind of work?

A. About 18 years.

Testimony of Jeff Anders

Q. Who do you work for now?

A. Redwine.

Q. You formerly worked for the Benedict Coal Corporation?

A. Yes, sir.

Q. There is some testimony in this record about a man by the name of Anders and a man named Roark and some dispute about a motor going over the hill. Were you the man Anders they were talking about?

A. Yes, sir.

Q. What was your job at that time?

A. Laying track.

Q. First let me ask you this about Mr. Roark. Do you know anything about Mr. Roark now?

684 A. Yes, sir.

Q. What is it, is he sick?

A. Yes.

Q. What is the matter with him?

A. He has some kind of epileptic fits.

Q. On this occasion what was his job, were you all track layers?

A. Yes, sir.

Q. Were you assigned to any special job at that time, Mr. Anders?

A. No, just a track layer.

Q. What about this motor?

A. That. Mr. Bob Fortner—

Q. Mr. Bob Fortner, who is the superintendent there?

A. Yes. He asked me and Roark to take the motor and get some steel, and it was sitting off a back track—

Q. Was it a motor that was used to pull on the track?

A. Yes.

Q. Were you a motor operator?

A. No.

Q. Never classified as that?

Testimony of Jeff Anders

A. No.

Q. You say Mr. Roark asked you to take the motor——

A. Yes, sir, and Roark and me talked with him.

Q. What happened?

685 A. We went around and the motor sat at the end of the track and the cable was laying there and it went about 250 or 300 feet and the track bends, and I give Mr. Roark, I say five minutes to go to the motor, and I hanged the nip on——

Q. What do you mean "hang the nip on?"

A. Juice, put the puice to the motor.

Q. You had to turn the current on in order to move the motor?

A. Yes.

Q. Could you see the motor at that time?

A. No.

Q. And the place you had to turn the current on, the motor was out of sight?

A. Yes.

Q. You had sent Roark to it?

A. Yes.

Q. What was the next you heard?

A. Well, Roark come back around where I was and he said that the motor went over the hill.

Q. You had a conversation with Roark and he told you the motor went over the hill?

A. Yes, sir.

Q. What happened?

A. Bob Fortner come around and looked at it and said, "I am sorry," and we went to the mine and he said,

686 "Well, I don't need you no more." He said careless.

Q. You were discharged?

A. Yes, sir.

Q. Did you finish the shift?

A. No, sir, we did not work any more. We stayed there and the next day——

Testimony of Jeff Anders

Q. Was there a work stoppage?

A. Two days.

Q. Any settlement negotiated out?

A. Yes, sir.

Q. Now, after this settlement was negotiated out what happened, were you paid for the days you had been laid off?

A. We were going to demand two days pay. We worked on and Fortner, he come to me in the mines——

Q. You demanded two days pay, did they agree to pay it?

A. No.

Q. What did you people agree to do about the two days?

A. Well, it went on and——

Q. Was it to go to arbitration?

A. Yes.

Q. Was that the agreement? After that agreement was made about arbitration did something else happen about it?

A. Yes, sir. Mr. Fortner come down in the mine where I was at and he told me if I would drop that that he would give me plenty of extra work to make it up.

687 Q. If you would drop the arbitration he would give you plenty of extra work?

A. Yes, sir.

Q. Did you drop it?

A. Yes, sir.

Q. Or did you agree the committee should drop it?

A. Yes.

Q. And it was dropped?

A. Yes.

Q. But the arbitration had been started?

A. Yes, sir.

Q. Now, you were put back to work after those two or three days?

A. Yes, sir.

Testimony of Jeff Anders

Q. Were you put back on a new and different job?

A. Back on track.

Q. Were you put back as a track layer the same as you were before?

A. Yes.

Q. On the same job?

A. Yes.

Q. No new job?

A. No.

Mr. Kramer: You may cross-examine.

688 **Cross-Examination**, by Mr. Winston.

Q. You say the same job, sir?

A. Same job.

Q. Was it on the same shift?

A. Yes.

Q. Same job and the same shift?

A. Yes, sir.

Q. Now as to Mr. Roark, what was his job?

A. He was helping me on the track.

Q. He was helping you on track?

A. Yes.

Q. And you were both sent to get the locomotive and you turned the electricity on and you did not know whether Roark was there or not?

A. I give him plenty of time to get there.

Q. How far was it?

A. 250 or 300 feet.

Q. 250 or 300 feet?

A. Yes, sir.

Q. Did you call to him and ask him if he was there?

A. No, sir. He couldn't hear me.

Q. He couldn't hear you?

A. Trucks, motors and everything going. He couldn't hear me if I was to holler.

Testimony of Jeff. Anders

689 Q. Which trucks and motors?

A. Coming on out, coal trucks hauling coal.

Q. Coal trucks hauling coal?

A. Yes.

Q. Trucks go down there continuously hauling coal?

A. Just about.

Q. Not just about, were they?

A. Going back and forward past there, and that sub was running. You couldn't hear nothing for it.

Q. You turned the juice on and he wasn't there and the thing went into the creek.

A. I don't know whether he was there. I gave him five minutes or longer to get there.

Q. Do you know the reason he did not get there?

A. No, sir.

Q. Did he ever tell you?

A. No, sir.

Q. Didn't you ever ask him?

A. All he told me the motor went over the hill just as he got out there.

Q. But you got discharged over it, didn't you?

A. Yes, sir.

Q. And you did not ask him why he did not get there?

A. No, sir.

Q. Now, had you ever used the motor to haul steel
690 or track material before?

A. Yes, sir.

Q. That is, you knew how it was done, didn't you?

A. I know how to run one.

Q. You had experience with motors of that type.

A. Yes, sir.

Q. And you knew that if you turned the juice on it would run?

A. If it was opened up it will.

Q. After you were discharged you say they had a strike?

Testimony of Jeff Anders

A. Yes, sir.

Q. Now, Mr. Kramer asked you about this arbitration thing. The fact is when you were discharged if you thought you were unjustly dealt with there being discharged, you could have taken it to arbitration, couldn't you?

A. Yes, sir.

Q. And if the Board had found you were unjustly discharged during the time you were off you would get pay for the entire time.

Mr. Kramer: We admit that, your Honor.

Q. (Continuing) This is my point, but no effort was made to arbitrate the fact that you were discharged, was there?

A. Yes, sir.

Q. And instead you had a strike and after the strike
691 the company agreed to take you back.

A. Yes, sir, they agreed to take me back.

Q. After they took you back you claimed that the two days you were off you should have the pay, that was what you were taking to arbitration, the claim for pay, wasn't it?

A. Yes.

Q. But as for your claim you were unjustly discharged, no effort was made to arbitrate that—just had a strike and they put you back on?

A. Yes, sir.

Mr. Winston: I believe that is all.

Mr. Kramer: That is all.

(Witness excused.)

Testimony of M. W. Clark

M. W. CLARK,

called as a witness by and on behalf of the cross-defendants, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Kramer:

Q. Mr. Clark, how do you sign your name?

A. M. W.

Q. Your age, please.

A. Forty-four.

Q. Are you a married man?

A. Yes, sir.

692 Q. Live where?

A. Big Stone Gap, Virginia.

Q. Work for whom?

A. United Mine Workers of America, District 28.

Q. In what capacity?

A. Field representative.

Q. How long have you been employed as a field representative for District 28 of the United Mine Workers of America?

A. Since July 16, 1952.

Q. Prior to July 16, 1952, what was your employment?

A. I was employed with Blue Diamond Coal Company in the Monarch mine at St. Charles, Virginia.

Q. In what capacity did you work for the Blue Diamond Coal Company at Monarch?

A. A number of different types of work in the mine. The latest work I did was weighman.

Q. Mr. Clark, were you called in by anyone in the Anders and Roark discharge matter?

A. Yes, sir, I was.

Q. By whom were you called?

A. As I recall it was a message related either directly

Testimony of M. W. Clark

to me by someone out in the field or a message came to my home from the company personnel. I wouldn't say just which one called.

693 Q. According to this record that was in August, 1952. Did you attend any meeting on that?

A. Yes. I met with management and committee on that matter.

Q. Where?

A. In the Benedict Coal Company's office at the mine.

Q. Who was there representing management?

A. Mr. Darst was there, and Mr. Robert or Bob Fortner as we knew him.

Q. And who was there representing—you were there, of course, been called in from the District, and who was there from the local, do you recall?

A. Yes. The committee members, as I recall, were Mr. Grant Mullins and Mr. Fred Tyler, and Mr. Jim Scott, I believe.

Q. What transpired in that meeting, in substance, as near as you can recall?

A. There was considerable discussion concerning the action of the company in discharging the two employees, Anders and Roark, and in routine discussion, investigation of the matter, it was shown that the action of the company was undue and harsh, and the company agreed to return the men to work. Following the agreement returning them to work, the matter of time that they had

Q. Before you leave that. Did you make any threat
694 on that occasion if they did not take the men back the strike would continue, anything like that?

A. I did not.

Q. Did you make any similar statement or anything of that type at all?

A. No, sir.

Testimony of M. W. Clark

Q. Now the company agreed after that matter to take the men back. What about the particular pay or pay for the two or three days they were off?

A. The matter of the time they had lost which—the company insisted they be given some penalty even though they be placed back to work, and they held them off some couple or three days and that matter of pay was referred by agreement to the arbitration board for disposition.

Q. The agreement reached with the men, the committee rather, was that they would permit him to stay off a couple or three days as a punishment or penalty?

A. That if the company insisted holding them off that matter would be disposed in arbitration as respect to their claim for pay for that time.

Q. The claim for pay was not for the two days of strike but for the additional two days after the strike and that the company insisted the men stay off?

A. That's right.

Q. So we understand, the pay for those two additional days after the strike ended in which these two men were kept off the job, the question of whether or not they should be paid for those two days was to go to arbitration?

A. That's right.

Q. Everybody agreed to that there, I assume?

A. Yes, a general agreement.

Q. And the local accepted that settlement?

A. Yes, sir.

Q. And the strike was off. What happened about the arbitration?

A. All parties were alert to the fact that it was to be arbitrated, and prior to the date of arbitration someone representing the company advised the District president that the matter was settled.

That is, some form of settlement giving these two men

Testimony of M. W. Clark

involved some additional work was agreed upon and the District president, Mr. Condra, asked that I make a routine check and ascertain if it was settled.

Q. And after Mr. Condra made the report to you did you make the check?

A. I did.

Q. You talked to these men about it?

A. The men and committee.

Q. And had it been agreed, settlement had been agreed upon?

696 A. Yes. The men involved admitted that they had agreed to accept some extra work and as far as their claim was concerned it was disposed of and they were satisfied.

Q. Thereupon I take it this reference for arbitration, whatever it was, was withdrawn and the arbitration was ended?

A. Yes.

Q. Now, Mr. Clark, in the course of this testimony it was stated by some witness that you were called in to settle the strike over the discharge of Ernest Tabor. Were you?

A. No, sir, I was not.

Q. Did you have anything whatsoever to do with any dispute over Mr. Tabor which occurred in November, 1951 according to this record?

A. November, 1951?

Q. Yes, sir.

A. No, sir. I wouldn't have been handling grievances at that time.

Q. You weren't even a field agent for District 28 at that time, were you?

A. I was not.

Q. Now, on the Wage Stabilization matter which occurred in October, 1952. You were a field man at the time that occurred?

Testimony of M. W. Clark

A. Yes, sir.

Q. Did you have anything to do with the work
697 stoppage or strike, whatever you want to call it,
that occurred at the Benedict mine in October of
1952 over the 40 cents, or the \$1.90, which ever way
you put it, increase when the men stopped work; did
you have anything to do with it?

A. No.

Q. Were you the field representative that was then
handling largely the work on the Benedict mine, the con-
tact man in other words, with District 28 and the Bene-
dict mine?

A. I was.

Q. Mr. Seroggs at that time was secretary of the Dis-
trict?

A. Secretary-treasurer, yes, sir.

Q. Did you advise or urge or counsel any of those men
to stop work or go on strike, that period from October 16
or 17, whenever it was, in 1952?

A. No, sir, I did not.

Q. Do you know of anybody from District 28 that did
do anything of that sort, urge the men to go on strike?

A. We had no way whatsoever.

Q. Now, Mr. Clark, after this general trouble over
the Wage Stabilization Board was ended, did anybody
call upon you to do anything with reference to getting
the men back to work at the Benedict mine?

A. Yes, sir.

Q. Just tell us what happened about that.

698 A. As I recall I was called in to the Norton office
by the District president, Mr. Condra, and he ad-
vised me, and I think showed, a telegram from the Wash-
ington office of the settlement of the wage matters.

I was instructed to contact the officers of the various
local unions in areas I was servicing and to advise them

Testimony of M. W. Clark

of the contents of this telegram and insist that they return to work immediately:

Q. Was the Benedict mine included in the group that was assigned to you to notify?

A. It was.

Q. Did you notify the Benedict local?

A. I did.

Q. Immediately?

A. Yes, sir.

Q. Did they return to work?

A. I couldn't say the exact date or hour they returned to work, but immediately upon the settlement of the terms of settlement which was contained in that message, all the mines down in the St. Charles field resumed operation.

Q. Were there a number of others down at that same time?

A. Yes, sir, there was.

Q. During the early part of 1953, in fact, I don't know how long, but were you working as a field agent for
699 District No. 28 in the early part of 1953?

A. No, sir. I was not active in the early part of 1953. I was off on sick leave.

Q. Do you remember what period that you were off on sick leave?

A. The date of it was about January 1, 1953 and I returned to work the 8th day of July, 1953.

Q. So that you were not at work then during May, 1953?

A. No, sir, I was not.

Mr. Kramer: Cross-examine.

Cross-Examination, by Mr. Winston.

Q. You were called in on the Anders and Roark discharge matter?

A. Yes, sir.

Testimony of M. W. Clark

Q. They had been discharged for running a locomotive into the creek and as a result of it you had a strike, isn't that it; isn't that why you were called?

A. I had no knowledge of it being run into the creek. The motor was run over a hill, as I recall.

Q. That was my recollection, sir. But anyway it was run over the hill. You came down and were they on strike when you got there?

A. I was there in the afternoon and I wouldn't say positively but possibly the mine was idle on that 700 day or been idle the previous day.

Q. You knew the mine, men were striking?

A. The mine had not come into it. I was called in on reference to the Roark and Anders discharge.

Q. You say the mine was idle. Why was the mine idle, wasn't it because of the discharge of the men?

A. In the discussion it came up, the company stated that was having some effect on that.

Q. The mine was idle because the men wouldn't work, they were on strike demanding the company take the men back.

A. When there is a stoppage the mine is idle.

Q. And the reason for it was that they discharged the men.

Mr. Kramer: We admit that.

Mr. Winston: I was asking Mr. Clark.

A. I learned in routine investigation that was some of the cause of the stoppage.

Q. Some of the cause. What was the other cause of stoppage?

A. Probably you better ask someone else about that. All I know is what—

Q. You said that was some of the cause of the stoppage. If there is some other cause I want—

A. I didn't ask to learn of any other cause.

Testimony of M. W. Clark

Q. You did not ask. You just understood that
701 was some of the cause?

A. I handled the only matter I was called in on.

Q. Isn't it a fact that the company wanted to arbitrate the discharge of those two people, didn't they?

A. No, sir. If I recall there was considerable discussion over the discharge and the company agreed with the committee that they would place them back to work.

Q. Yes, sir, and at the time the men were out striking and the company made that concession.

Mr. Kramer: We admit that, your Honor.

A. I think I just stated that.

Q. This thing about the arbitration you are talking about, that wasn't over the discharge of the men. That was whether they should get the two days pay, wasn't that right; that came up after the strike was over?

A. This to be arbitrated was with reference to the additional penalty. I just stated that.

Q. The two days pay?

A. Yes, sir.

Q. Now you also testified about this stoppage—what do you call it, a stoppage or strike? What term do you use?

A. We commonly refer to it as work stoppage.

Q. That is the same thing, isn't it?

A. It would depend on your own terminology as to how you want to apply it, I suppose.

702 Q. And in October, 1952, you say Mr. Condra advised you after he got a telegram from Mr. Lewis to go out and tell the locals to go back to work, isn't that right?

A. I stated I was told to that effect and that I did go out and advise them.

Q. That is the first time during that stoppage that you advised any of the locals to go back to work, isn't it?

Testimony of M. W. Clark

A. I don't recall having any direct contact with the officers. If they may have inquired of me I suppose I told them to return to work, but that was the mission I was on.

Q. Do you remember whether you told any of the locals to go back to work before Mr. Condra showed you that telegram that he got from Mr. Lewis?

A. I don't remember that I did or that I did not.

Q. You couldn't say that you did?

A. That is right.

Mr. Winston: That is all.

Redirect Examination, by Mr. Kramer.

Q. Mr. Clark, on this matter of the Anders and Roark, was there anything said by the management there, or any information brought to them, as the reason they were willing to take these men back?

A. Yes. As I recall, in the examination of the facts in this meeting—we were in the meeting in the office—
703 the management showed that, as the company had been told concerning the happening, and the examination brought out some other facts which were not exactly as they had found.

Q. Can you recall, briefly, what were the facts that were brought out that the company and management said they did not know about earlier?

A. Well, the company was contending that the men knew all about the condition there and it was complete negligence on their part, and the evidence revealed that these men had come down to move this motor to do some work on the track. One of the men was to apply the current by placing what we commonly refer to as the electric nip on the wire, and the other man was to go down to the motor to operate it, and the man going down to the motor was going to move it and the man going to put the current on naturally was not working together by reason of the fact they were track men.

Testimony of Allen Condra

Q. Was anything brought out that they could not see each other at the time or blocked by something?

A. Yes, sir. There was a distance between the man going to apply the current and the man going to move the motor.

Q. Was that brought out at the meeting?

A. Yes, sir.

Mr. Kramer: That is all.

Mr. Winston: That is all.

(Witness excused.)

704

ALLEN CONDRA,

called as a witness by and on behalf of the cross-defendants, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Kramer.

Q. Your name, please.

A. Allen Condra.

Q. Mr. Condra, how old are you?

A. Forty-five.

Q. Are you a married man?

A. Yes, sir.

Q. Where do you live?

A. Pineville, Kentucky.

Q. What is your occupation now?

A. International representative of the United Mine Workers.

Q. How long have you been an International representative of the United Mine Workers of America?

A. Well, the last time since June, 1954.

Q. Now, is that a position with reference to the International or is that a position with reference to the District?

A. I am employed by the International Union and assigned to a District to work in.

Testimony of Allen Condra

705 Q. What District board are you assigned to?

A. District 30.

Q. Were you formerly connected in any way with District No. 28?

A. Yes, sir. I was president of District No. 28.

Q. When were you president of District No. 28 of the United Mine Workers?

A. I went in as acting president October 15, 1950, stayed until March 31, 1951; and the man that was off ill at the time, the president, came back and I left District 28, and returned again to District No. 28 as permanent president on June 25, 1951, and remained there as president until June 1, 1954.

Q. Mr. Condra, did you have any connection with a strike or work stoppage that occurred at the Benedict mine over Collingsworth—I withdraw that. That was January, 1951, and you did not go in as president until June, 1951.

What about the work stoppage or strike that occurred in July, 1951, over the vacation pay?

A. I don't recall any knowledge of that strike at that time. It was apparently settled at the mines. I don't recall it being called to my attention.

Q. In other words, you did not participate in it any way?

A. No, sir, no way.

706 Q. How many locals are in your District, District No. 28?

A. I could only give you the approximate number at that time. Around 75 and 100.

Q. Between 75 and 100 of which Benedict was one?

A. They were one of them; yes, sir.

Q. There was another strike or work stoppage in October, 1951, over the cutting off of credit by the company at the company store for certain men. Did you have anything to do with that?

Testimony of Allen Condra

A. What date in October was that?

Q. The first week of it, I believe. They claim beginning on the 2nd and returning the 8th.

A. No, sir, I don't recall any knowledge of that strike either.

Q. You were not called in or had anything to do with it?

A. I was not called.

Q. Do you know anything about a strike that was over the discharge of a man by the name of Tabor?

A. No, sir.

Q. Never hear of anyone of that kind?

A. No, sir, I don't recall him.

Q. Now, was the dispute of two men, Roark and Anders in August, 1952. Do you know anything about that?

707 A. Yes, sir, I do recall that strike.

Q. Were you called into it?

A. I was notified that the mine was down and I talked to the committee about it. They told me about the strike and they were advised to put the mine to work, to take up the men's grievance, which they did.

Q. You say they were advised to put the mine to work. You mean you advised them to put the mine back to work?

A. They were not advised to put the mine back to work. They were advised to put the mine back to work

Q. To put the mine in operation?

A. Yes, sir.

Q. When you say "they," you are talking about the local?

A. The mine committee and the local union officers.

Q. Did you participate in any meetings on that?

A. Not in that one. It is possible, I believe one of the representatives of the District did attend a meeting, and I am not sure who I sent down on it at this time.

Q. But you did not?

A. I did not go down on it.

Testimony of Allen Condra

Q. Do you know anything about any portion of that being referred to arbitration?

A. Yes, sir. The mine returned to work and the case was handled under the grievance machinery of the 708 contract. No agreement was reached when it was first handled but then it was filed and the case was to be heard before the Board of Arbitration.

When it was filed there was some belief that possibly a settlement might be worked out and they wanted a little time before we went through with the arbitration of the case.

At any time we believe that a settlement could be reached between the mine management and the mine workers, we took the time necessary to try to reach a decision without arbitration if we could.

That was held a few days, or I don't know how long, to give them time to try to work it out, and then I was notified by Mr. Darst by telephone that the case had been settled and requested it be withdrawn from the Arbitration Board, and I agreed if it was settled we would. And then the committee, or the president of the local union at that time, Mr. Ellis Lynn, called me and he was rather upset because of the settlement. He was not too happy about the way it was settled, and I told him I had not made the settlement. The settlement had been made at the mine with the superintendent, Mr. Darst.

He said he did not know of any settlement and I had it checked into by the District field worker.

Q. Who was the field worker you sent to investigate, Mr. Clark?

A. Mr. Clark.

Q. Did you get a report back from him?

A. Yes, sir, I got a report back from Mr. Clark.

Q. After getting that report back from him what did you do?

A. Withdrew the case from the Board.

Testimony of Allen Condra

Mr. Kramer: I want to show you three papers fastened together, a printed form, United Mine Workers of America, District No. 28, Grievance Report, and which shows to be filed on August 8, 1952, however dated August 7, 1952, at the top and stamped as August 8 at the bottom, there are two of these sheets, and in between these two sheets is a letter by Mr. Clark addressed to Allen Condra, is that right?

A. That is right.

Q. And the date of the letter is what?

A. It is on 15th of November, 1952.

Q. Are these the records of that grievance procedure on what happened to it?

A. They are.

Mr. Winston: It is all right.

Mr. Kramer: I want to file these three pieces as Collective Exhibit No. 32.

I have not had copies prepared. Does the Court
710 prefer I do so?

The Court: No.

(Exhibit No. 32 was filed.)

By Mr. Kramer:

Q. I notice on the back of this page, that is the first page of this instrument, the following:

"Name of complainant, Melvin Roark and Jasper Anders; Address, St. Charles, Virginia; Class of work, track men; Section of contract violated, discharge; date grievance taken up by field worker, August 6, 1952; State nature of grievance in detail and settlement, if any"—

Mr. Winston: If your Honor please, we object to that as being a self-serving declaration.

The Court: That is not substantive proof as to matters contained in it.

What is the purpose in asking—

Mr. Kramer: There is a denial in this record that any grievance was taken. That was the testimony of one of

Testimony of Allen Condra

the witnesses of the cross-plaintiff—until long after this grievance. In other words, they say none was filed immediately after they went back to work.

Mr. Winston: You can show the date.

Mr. Kramer: I want to show what it was.

Mr. Winston: We object, if your Honor pleases.

The Court: You cannot show that by the report.
711 That is not substantive evidence. That is self-serving evidence, but you can offer it for the purpose, if you desire, to show that they did not come back until—

Mr. Kramer: No, your Honor. This record as it stands now is this, that there was a strike—these men were discharged and there was a strike. The men were put back to work.

Our testimony is that they were put back to work after a two-day penalty and the strike was over but these men stayed off two additional days, and at the time that the strike was settled it was agreed these men would have to stay off the two days and the other men go back to work, but it was further agreed that whether or not these men should be entitled to pay for these two additional days, not the strike days, was to be referred to arbitration.

The other side says that is not true. The other side says there was no agreement to refer the matter of this additional pay, or this pay to arbitration until a pay day arrived subsequently and at that time these two men did not find the money for those two days in their pay envelope, and then they started the grievance procedure.

I am filing them to show, your Honor, as corroborative
712 of the statement that the grievance procedure was filed the day the men went back to work.

The Court: It is competent. I hold then it is competent for corroborative purposes only.

Mr. Milligan: We will stipulate that the grievance procedure was filed on the date shown on that instrument.

Testimony of Allen Condra

Mr. Kramer: And for the back pay for those two days?

Mr. Milligan: That is right. Is that what you are seeking?

Mr. Kramer: It has been denied.

The Court: That is admissible and the jury may consider it for corroborative purposes.

Mr. Kramer: I, therefore, your Honor, do not want to take the time to read it; but that was at variance with the proof.

By Mr. Kramer:

Q. Mr. Condra, you were president of the local in October, 1952, when the \$1.90 question arose before the Wage Stabilization Board?

A. I was president of the District at that time.

Q. District 28, I mean.

A. Yes.

Q. Did you have anything to do as president of this District with the men going out on a strike?

A. No, sir, did not have a thing to do with it. That spread or mushroomed as the newspaper, radio, television, was carrying reports of mines being down in certain areas and in the next report there would be more down, and the strike kept on spreading.

Q. Was this the only mine in your District down?

A. No. I think they were practically all down.

Q. Did you do anything to aid or ask the men to stop work at any of these mines?

A. I didn't ask them to stop work or strike at no mine.

Q. Did you receive a telegram from Mr. John L. Lewis under date of October 27 advising you with reference to getting the men back to work?

A. Yes, sir, I received it.

Q. You have the original here?

A. Yes, sir.

Mr. Kramer: This is one of which a copy was filed yesterday and we want to file the original also.

Testimony of Allen Condra

(Exhibit No. 33 was filed.)

By Mr. Kramer:

Q. Upon receipt of this telegram, which telegram instructed you to get in touch with the officers of the local and try to get them to work, what did you do?

A. I called in my field staff and gave them copies of this telegram from President Lewis and told them
714 to personally contact the officers and committeemen of each of our local unions and have them to arrange meetings and immediately return to work. I also sent copies of that telegram to the secretary of each local union in my District.

Q. Did you, after sending the telegrams to the various locals in your District, follow out the statement which is the last one in this telegram, "Please acknowledge receipt of this telegram and state what steps are being taken in your District"?

A. Yes, sir, I did.

Q. What did you do, in addition to what you have told us?

A. I wired President Lewis the action I took.

Q. Have you taken from your files and furnished to me a copy of this telegram that you sent?

A. Yes, sir.

Mr. Milligan: We except to that, if your Honor please, an inter-office communication.

The Court: For what purpose is that offered?

Mr. Kramer: To show, your Honor, that the District complied with the suggestion.

Mr. Milligan: We also except as it is a self-serving declaration.

Mr. Kramer: Our purpose, your Honor, is to show that we complied with the request in that telegram. The
715 telegram asked us to do two things, three things, namely, get in touch with the locals, he testified he did, and of course to report back to Mr. Lewis—

Testimony of Allen Condra

The Court: Overrule the objection. It may be received for that purpose only.

(Exhibit No. 34 was filed.)

Mr. Kramer: This is a telegram dated October 27, 1952.

“Mr. John L. Lewis:

“All Local Unions in District 28 have been advised by telegram to resume work immediately. Officers and representatives are personally contacting officers and members of our Local Unions, urging them to return to work immediately. /s/ Allen Condra.”

This is filed as Exhibit No. 34.

Mr. Milligan: What are you reading from?

Mr. Kramer: I am reading from what he has shown is a copy of the telegram he sent to Mr. Lewis. I asked him if he got it from his file and he said he did, and this is it, and I am reading from it.

Mr. Milligan: May I see it?

Mr. Kramer: Yes.

By Mr. Kramer:

Q. Mr. Condra, did you ever at any time instruct the local, the Benedict local of District No. 28, the mine committee or any of the mine committees of District
716 No. 28, of the Benedict local, to walk out in any of these wildcat strikes?

A. No, sir, at no time.

Q. Did you in any way encourage them to walk out on them or to continue them?

A. No, sir. The District officer instructs and advises them at all times to keep their mine in operation and take up the grievance with the provisions of the contract.

Q. Mr. Condra, do you know while you were president of this District, you recall the Big Mountain Coal Operation?

A. Yes, sir, I do.

Q. Did you at any time meet with Mr. Swisher of the Big Mountain?

Testimony of Allen Condra

A. Yes, sir, I met with Mr. Swisher two or three times.

Q. Do you recall the date of any of those meetings?

A. I recall the date of one of them.

Q. What was that date?

A. May 27, I believe, 1953, and I met him once prior to that, shortly prior to that. I can't recall the exact date though of that meeting.

Q. On that earlier meeting, where was it held?

A. In my office in Norton, Virginia.

Q. Who was there and what transpired?

A. Mr. Swisher was there and Mr. Rains, as I recall. I believe that is all. I don't think anyone was there
717 except myself and the mine worker.

Q. Tell us about that occurrence.

A. They came into the office to discuss Mr. Swisher's signing the National Bituminous Coal Wage Agreement.

Q. That is as an operator?

A. Yes, sir. And we discussed the local unions that his members, his employees would be in. Mr. Swisher wanted them in a separate local union. A local of his own, as he expressed it. And we had considered at least putting them in the Benedict local union.

There was no final decision made upon where they would be. In fact, I didn't have the authority to decide what local union they would be in.

And we discussed it back and forth. Mr. Swisher was afraid if they were in the Benedict local union the Benedict mine committee would interfere with his men.

I pointed out to them if they were in the Benedict local he would not have to meet or deal with the Benedict committee or officers in any way. He would have a committee of his own, elected from his own employees to take up grievances on matters arising in his operation. But he still did not like the idea of being in the Benedict local union.

Testimony of Allen Condra

At that time, and also on May 27, Mr. Swisher did not have enough employees to get a charter.

Q. Under this record that was 10, correct?

718 A. It was under 10.

Q. It took 10 or more?

A. Ten or more to get a local, individual local, and he did not have 10 up until some time after May 27.

There was no final decision made upon that at that time, and I don't know if it was that date or some later date I told him the United Mine Workers would take it under consideration and decide where would be the best place to put them.

That is a question for the Union to decide. We don't tell the coal operators where their offices would be or their office set up, and they don't tell us where the members would be placed in the local union.

Q. You said you had no authority to determine whether or not there would be an additional local for them. Who makes that determination?

A. The International Union does that.

Q. Do you, when that situation arises, as a District president, make recommendations?

A. Yes, sir, I do that.

Q. But you have no authority to determine the question?

A. None whatsoever.

Q. After this meeting was there an agreement handed back and forth at that meeting?

719 A. Yes, sir. Mr. Swisher asked for and received a few copies of the Wage Agreement which we had asked him to sign.

Q. They were not executed there?

A. No. He wanted to see them and we gave him three or four copies.

Q. Was there any question about his corporate name?

A. Yes, sir. That hadn't been settled at that time. He

Testimony of Allen Condra

was trying to incorporate his company and he was not just sure what name it would be under, and he said he couldn't sign a contract until he definitely knew the name of his company when it was incorporated.

Q. Did you hear anything from Mr. Swisher between that meeting there in your office in Norton and the meeting on the 27th of May?

A. That is, the 27th of May was the next meeting I had with Mr. Swisher.

Q. In the meantime, I believe, however, you had received a letter from Mr. Swisher, had you not?

A. Yes, sir. I received a letter from him with the enclosed contracts, I believe.

Q. Do you have the original of the letter received from Mr. Swisher? I have here what is a photostatic copy, but I do not have the original. Do you have the original?

The Court: Well, just use the photostatic copy without objection.

720 Q. (Continuing). A letter dated May 13, 1953, written by Mr. Swisher to you.

A. Yes, sir.

Mr. Kramer: The original was filed as an exhibit. The cross-plaintiffs filed it.

The Court: Yes.

By Mr. Kramer:

Q. Do you have a copy of another letter that was received by you from Mr. Swisher under the date of May 14?

A. Yes, sir.

Mr. Kramer: I will ask to file this as Exhibit No. 35.

Mr. Winston: Let me see it, please.

By Mr. Kramer:

Q. While counsel is examining that I want to show you a photostatic copy of a communication signed by you dated May 18, 1953, and addressed to Mr. Swisher.

A. Yes, sir.

Testimony of Allen Condra

Q. You wrote the letter and that is a copy of it?

A. That's right.

Mr. Kramer: I offer the letter of May 14, 1953, your Honor, as Exhibit No. 35, and this reply of Mr. Condra as Exhibit No. 36.

(Exhibits Nos. 35 and 36 were filed.)

Mr. Kramer: The letter of May 18, which was written in response has not been read to the jury, which is now Exhibit No. 36. I would like to read that, your Honor.

“May 18, 1953.

“Mr. Ura Swisher, President
Big Mountain Coal Company, Inc.
St. Charles, Virginia

“Dear Mr. Swisher:

“This will acknowledge your letter of May 14 with attached three copies of the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952.

“In regards to your question as to the employees of your operation having a Charter of their own—that is a matter of Policy which will be decided by the United Mine Workers of America.

“Very truly yours,

“Allen Condra,
President District 28, U. M. W. A.”

By Mr. Kramer:

Q. Now, did you know of any trouble that occurred at the Big Mountain Coal Mines along in May, about the time of these letters and the signing of this agreement?

A. No, no trouble to my knowledge.

Q. Were you called by Mr. Swisher with reference to any trouble, ask you to try to settle any trouble?

A. In May?

Testimony of Allen Condra

Q. Yes, sir.

722 A. No, sir. I was called by Mr. Darst for a meeting on May 27, and after I got through the meeting with Mr. Darst, Mr. Swisher came in and met with him. I didn't know when I came down there Mr. Swisher was going to be there.

Q. What was Mr. Darst's meeting called for?

A. Mr. Darst wanted to meet with me, and I don't believe he went in detail what he wanted to meet about.

He wanted to meet with me and discuss some problems he had at the mine. Mr. Seroggs, secretary-treasurer of the District at that time, and I went down to meet with him on the 27th day of May, 1953, and what he wanted to talk about was the problem, he wanted to what they call "gang work" part of his mine—two sections of it to begin with, that he wanted a group or bunch of men to go in and let them share whatever they make, what we call gang working a mine.

Whatever they make they lump it all together and divide it among the men working there.

I told him we couldn't agree, it was not contract. The only way we could agree to that was to guarantee each of those men a day's wage as provided for in the Wage Agreement.

Mr. Darst said he couldn't do that; he couldn't make any guarantee to them, whatever they made they would get. He said if he couldn't do that he would have to let off several of his men.

723 I told him I would hate to see him cut off some of his men, but I told him under the contract he had a right to reduce his work force if he wanted to, and that concluded our meeting.

Then after we were through Mr. Swisher come in and we again discussed the charter of his employees up there but reached no decision on whether to have a charter or not.

Testimony of Allen Condra

At that time they did not have the 10 men to get a charter. And, furthermore, to get a charter the men have to meet, the employees, and select their own officers among themselves. We have nothing to do with that. That you do under a secret ballot.

Q. Had that been done?

A. That had not been done at that time, so a charter couldn't be recommended for them either until that had been done. So no decision was necessary at that meeting in regard to the charter.

Q. Was something finally done at a later date with reference to a separate local for the Big Mountain?

A. Yes, sir. We had had some men up there working for Mr. Swisher, according to my reports, field workers, and the men local they wanted their own charter. It is true some of them did want their own charter and some wanted in the Benedict local union.

724 We haggled around over there and come to the conclusion, I didn't think it was worth scrapping over, whether they were in the Benedict local or had their own union, so many things involved, but I agreed we would let the men meet and let them say if they wanted a charter of their own, and if they wanted a charter of their own I would then recommend to the International Union they be given a charter.

Q. They were to have an election?

A. Yes. They met, they voted they would like to have a charter of their own, they elected their own officers by secret ballot among themselves and turned it in to me, and I sent the request in to the International Union for a charter for them.

Q. Mr. Condra, do you recall receiving a letter, or a copy of a letter, written by Mr. Darst to Mr. John L. Lewis under date of May 20, 1953, that has been filed in this record as Exhibit No. 6?

A. Yes, sir, I remember receiving a copy of that letter.

Testimony of Allen Condra

Q. There is already filed in this record a copy of it and also a copy of the reply that you sent to Mr. Darst. I believe you did send a reply, did you?

A. Yes, sir.

Q. And what was done after you received this letter—let me get your reply though. I show you Exhibit No. 16 and ask you if that is a copy of your reply?

A. Yes, that is.

725 Q. This Exhibit No. 16 makes this statement. I am not going to read it all. "May I remind you, Mr. Darst, that on Tuesday, May 19, your employees voted to return to work and so advised the Mine Management through the Representative of the Local Union. On that same day, May 19, you posted a notice that the mine would not work on Wednesday, May 20. Your employees have stood ready and are now ready to resume operation at any time that you see fit to put the mine in operation."

Did you get any reply from Mr. Darst to that statement in that letter?

A. No, sir, but it was a day after that I was down there and Mr. Darst told me then his cost of production was so high he had to do something to reduce the cost, that was the reason he wanted to gang work part of the mine, and the mine was down.

Q. That was the day this letter, the answer of yours, May 26?

A. That's right.

Q. Your meeting in which he wanted to gang work was May 27th?

A. That is right.

Q. When you did not agree and told him you couldn't agree, did he open up then, how soon after that did he open up?

726 A. Just a matter of a very few days. He told me then he would have to cut off some men if he couldn't gang work his mine.

Testimony of Allen Candra

Q. Reduce his forces, but he did open up?

A. Yes, sir. But there was no question about a work stoppage the date I was there, or strike.

Q. He raised no question on that?

A. No, sir.

Q. Now on the M. M. Campbell matter. Do you know anything about the M. M. Campbell dispute?

A. I don't know of any dispute there.

Q. Did you participate in any meetings?

A. No, sir, only with Mr. Campbell. Mr. Campbell came to my office and signed a contract.

Q. Do you recall the date he came to your office to sign a contract?

A. I think I have a note of the date that was. February the 3rd, 1953.

Q. Who, if anybody, was with Mr. Campbell on that occasion, if you can recall?

A. During the time Mr. Campbell was in my office, of course Grant Mullins, mine committeeman came into the office, and I believe Ellis Lynn, president of the local union, was in the office also that day at the same time Mr. Campbell was.

Q. Did anybody that you saw have any guns there that day?

A. No, sir.

Q. Any threats made that day that you know of?

A. It was a very agreeable meeting and everybody seemed to be in a good humor.

Q. Did Mr. Campbell give any indications by word or action—

A. It appeared to me he was very anxious to sign the contract because he doubted if he would be eligible to be a member of the UMW, and I asked him if he was doing any contract work, himself, and he said he was, and I told him if he worked he would be eligible to membership.

Testimony of Allen Condra

and I got the impression from him he was interested in signing the contract so he could get to be a member and have the benefits of the mine workers himself.

Q. You told him he could be a member if he was doing work within the purview of it?

A. That's right.

Q. Did he raise with you that date any question that the men had been bothered and intimidated, that that was the reason he was signing a contract?

A. No, none whatsoever.

Q. After the execution of that agreement what, if any, was your next contact with Mr. Campbell?

A. I don't recall having any other personal contact
728 with him. He called me by telephone.

Q. Tell us about that.

A. That Mr. Darst was trying to squeeze him out and made it rough on him, and wanted to know if we could do anything to help him.

Q. Do you recall when that was?

A. Shortly after he signed the contract. I don't recall the date, no, sir. I wouldn't want to give a date unless I knew it. I don't recall.

Q. What was your response to Mr. Campbell?

A. I didn't know the circumstances and I didn't want to commit myself to him or anybody without knowing the details as to both sides.

I told him that I didn't know; we would look into it and find out what it was about, and I found out Mr. Campbell had not actually joined the local union for some reason and we never went any further into it.

I never got involved either way. It would be between the contracting parties, the Benedict Coal Company and Mr. Campbell, and the Mine Workers were not involved in their dispute.

Q. Did you hear any further from him later on that?

Proceedings

A. No, sir. I think that is the last I heard of Mr. Campbell.

Q. Did you ever at any time in connection with Mr. 729 Campbell's operation, or anybody else from District

No. 28 that you know of, give any encouragement or make any request or direct any work stoppage of Benedict Coal Corporation's operations?

A. Oh, no; no, sir.

Q. Mr. Condra, did you ever hear Mr. Scroggs or Mr. Clark give any directions or instructions to any mine committee connected with Benedict, or to any group of the local of Benedict, with reference to pulling strikes, that they should strike when they did not get what they wanted?

A. No, sir, I never did. That was contrary to all of our policy. The policy was to take up any grievance that there might be under the machinery of the contract, and I never heard them encourage or insinuate in any way anybody should strike.

Mr. Kramer: That is all.

The Court: Keep in mind the instructions, lady and gentlemen. Adjourn Court until five minutes until 2 o'clock.

(Whereupon at 12:30 p. m. Court recessed for the noon hour.)

730

Afternoon Session.

(Whereupon, at 1:57 p. m. Court reconvened pursuant to the recess, and the following proceedings were had in the presence of the jury, to-wit:)

The Court: Proceed.

Testimony of Allen Condra

ALLEN CONDRA,

resumed the stand and further testified as follows:

Cross-Examination, by Mr. Winston.

Q. Did I understand you to say that it was your policy, or District policy, to always go through the machinery of the contract when a grievance came up?

A. That's right.

Q. Did you ever refuse to arbitrate anything?

A. No, sir.

Q. To refresh your recollection, you know the Blackwood Fuel Company, don't you?

A. Yes, sir.

Q. You were called when they laid off Mr. Bud Arnett in 1951, I believe September or August.

A. Bud Arnett?

Q. Yes, sir. Do you recall there was a big lawsuit over it?

Mr. Kramer: Your Honor, I don't understand about that.

It does not pertain to Benedict, does it?

731 Mr. Winston: No, but I understood him to say the District policy was to follow the contract and arbitrate. He said he had never refused to arbitrate, and I would like to take issue with that.

Mr. Kramer: I object to going into transactions of some other company.

The Court: Sustained.

Mr. Winston: We save exception.

By Mr. Winston:

Q. I would like to ask you if you did not refuse to arbitrate a matter with Mr. Fred Loving who was a foreman or an official of the Blackwood Fuel Company in 1951.

Mr. Kramer: That is objected to.

The Court: The answer may be considered solely in

Testimony of Allen Condra

weighing the testimony of the witness, but for no other purpose.

Mr. Winston: That is the reason.

The Court: All right.

The Witness: Could I have the question again, please.

Mr. Winston: Would the reporter please read the question.

(The pending question was read by the reporter.)

A. I don't recall meeting Mr. Loving in 1951 on any grievance to arbitrate it.

Q. That was not the question.

732 By the Court:

Q. Well, the answer was no?

A. Yes, no.

The Court: That ends that.

By Mr. Winston:

Q. Now, sir, you became the president of District 28, acting president, in 1950?

A. That's right.

Q. And then in 1951 you were made the not acting but regular president, is that correct?

A. That is right.

Q. And you were appointed to both of those positions by Mr. John L. Lewis, were you not?

A. Yes, sir.

Q. Mr. John L. Lewis also appointed the secretary-treasurer during your tenure of office, didn't he?

A. Yes, sir.

Q. And he also ordered you to fire a field representative, didn't he?

A. No, sir, he did not.

Q. Do you know Mr. Charlie Minton?

A. Yes, sir.

Q. Did Mr. John L. Lewis tell you to fire him?

A. I discussed the situation of Mr. Minton with Presi-

Testimony of Allen Condra

733 dent Lewis—Mr. Charles Minton was a son of the former president who I succeeded, and Mr. Minton did not seem to care about working for me when I went over there. His work was not satisfactory, and I discussed Mr. Minton, Charles Minton, with President Lewis and he concurred in the discharge of Mr. Minton, but he did not order me to fire him.

I got a letter from Mr. Lewis in writing authorizing me to go ahead and let Mr. Minton go, to terminate him for two reasons, one which I stated and one was for economy purposes.

Q. Now, sir, you have testified about a few of these strikes. You did know then during this period the Benedict Coal Corporation was having a number of strikes, didn't you?

A. I heard of some of the strikes that was mentioned after they were over and settled out, part of them, yes.

Q. You knew they were having a number of them?

A. I knew they had some strikes there, yes, sir. I don't know how many. I don't know if I heard about all of them or not, but I heard about some of them.

Q. Talking about the strike there in October, 1952. Did you get a letter or a telegram, I believe you stated from Mr. Lewis, and when you got that telegram from Mr. Lewis you sent Mr. Clark, I believe, down to see that local went back to work, is that correct?

A. That local along with all the other locals in his field.

734 Q. Will you tell us the date you sent word for them to get back to work?

A. I believe it was dated the 27th. I am not sure what date it is. It was the same date I received the wire and wired Mr. Lewis.

Q. The 27th of October?

A. Whatever date was on that letter that I wrote to

Testimony of Allen Condra

President Lewis telling him I had complied. That is the same day they went out.

Q. Well, before that date I will ask you if you had made any effort to get those men back to work at Benedict before the date you sent that reply back to Mr. Lewis?

A. No, sir.

Q. And you knew they were down.

A. I knew they were down and along with all, practically all of the other mines in my District, and throughout the country.

Q. You spoke of a telephone call you got from Mr. Campbell. Where were you when he made that telephone call?

A. In my office in Norton, Virginia.

Q. Do you remember about the date?

A. No, I don't remember. It was about the time that, shortly after the time that he signed the contract. I don't know the correct date on it and I wouldn't want to testify to a date I was not positive of, but I don't know the date.

735 Q. Where did he call from?

A. I don't know where he was calling from.

Q. Did you see him any more?

A. No, sir, did not see him.

Q. And you received no more calls from him?

A. No, sir.

Q. And you are sure that is after the date he signed the contract?

A. Yes, sir.

Q. When he came to sign a contract did you know he was coming?

A. Yes. I believe one of the committees told me they were coming up; Mr. Campbell wanted to see me.

Q. When they came up I believe you said, "I see you got him," or "You got him here"?

Testimony of Allen Condra

A. No, sir, I didn't say that.

Q. And you were looking for him?

A. Yes, sir. I was expecting him.

Q. And you knew there had been a strike or was a strike down at the Benedict at that time, didn't you?

A. No, sir.

Q. Now coming to the Swisher matter. You know Mr. Ura Swisher.

A. Yes, sir.

Q. Mr. Swisher and Mr. Darst and a bunch came to
736 your office there and took the position that you would determine whether or not they would have a charter or a different local for their men.

A. No, I could not give them a different local for their men. I could only recommend.

Q. Yes, sir, and it was his position that he would sign the contract but upon the condition that he could have a separate local.

A. He wanted a separate local.

Q. And when he sent the contract back it was accompanied by a letter that said he had enclosed it still on the condition he still have a separate local?

A. That was in his letter and in my letter I told him it was a matter for the United Mine Workers to decide.

Q. So you had signed it on his condition?

A. No. That was his statement. But certainly we did not accept it as the condition I signed it upon.

Q. Now after that you had a strike at Benedict coal mines, didn't you?

A. After what date now?

Q. After you got that contract back?

A. Yes, sir. There was a strike there on the 18th of May, I believe, and voted to go to work on the 19th and the company then after this vote on the 19th did not work the mine until the latter part of May or the first of June.

Testimony of Allen Condra

737 Q. Was Mr. Swisher down during that time?

A. Mr. Swisher, as I recall, had nine men at that time, and I believe those men were primarily on construction work preparing to get ready to work.

I don't know whether he was running coal at that time or not. When I met with them on the 27th he did not say anything about a strike at his place.

Q. You say you met with him and Mr. Darst on May 27?

A. I believe that is right.

Q. And he did not say anything about a strike?

A. No, we discussed the charter.

Q. The fact is at that time the members of that local had been picketing his job and keeping his men from going to work?

A. No, sir.

Q. Weren't you served with an injunction on the 27th or the day after?

A. I don't know what date it was. There was an injunction served thereabouts, the 28th or 29th, somewhere along there, yes.

Q. You mean to say he did not say anything about any pickets when you saw him on the 27th?

A. That's right.

Q. And still you were served with an injunction that was dated the 27th day of May, 1953?

738 A. Yes, sir, it was started—is that the date?

Mr. Kramer: We haven't the service on it. Is that the date it was signed?

Mr. Winston: That was the date it was dated.

Mr. Kramer: Not date of service?

Mr. Winston: Yes, sir.

By Mr. Winston:

Q. Do you know what day that was served on you?

A. No, I don't know what day it was served. It was not served on the 27th.

Testimony of Allen Condra

Q. But you were there in Norton the 27th?

A. I was at Benedict the 27th.

Q. And you came down back to Norton, there on the 28th?

A. And it was pointed out when that injunction was served that the mine was not being picketed, no trouble there as far as I know.

Q. Well, the fact is he did not get a separate local until after that injunction order was served?

A. That's right. It was after that, about the latter part of June, I believe, may be the first of July, when I recommended that a charter be put in there.

Q. To refresh your recollection, wasn't that injunction served on you while you were at Benedict the 27th?

A. No, sir, it was not.

Q. Did you see any pickets up there?

730 A. No, sir, I did not.

Q. Did you know of any pickets?

A. No, sir.

Q. Did you know of any disturbance up there during that week?

A. No, none to my knowledge. The Benedict men were ready to go to work.

Q. What was that injunction about that was served on you?

A. I don't know. I understand Mr. Swisher claimed that somebody had been talking to some of his men, but I honestly don't know of anything that was done there to interfere with his production in any way.

Q. Do you know what the cause of that strike at Benedict was, that happened in May, commenced May 18th, 1953?

A. Yes, sir. The president of the local union told me that the company had not reported that they had paid their royalty payments as provided for by contract. They

Testimony of W. E. Wilder

are supposed to report to the president of the local union by the 18th that they have paid their royalty for the preceding month.

Q. When did the president of the local advise you that, when did you have that knowledge?

A. That was on either the evening of the 18th or the morning of the 19th. I believe on the evening of 740 the 18th in my office.

Q. He advised you of that at that time?

A. That's right.

Mr. Winston: That is all.

(Witness excused.)

W. E. WILDER,

called as a witness by and on behalf of the cross-defendants, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Rayson.

Q. Would you state your name, please.

A. W. E. Wilder.

Q. Where do you live?

A. I live at Dufield, Virginia.

Q. How far is that from St. Charles?

A. It is approximately 18 miles.

Q. Mr. Wilder, back in 1952 did you have occasion to work for a man by the name of M. M. Campbell, a contractor at Benedict?

A. Yes, sir.

Q. What part of the year was it you worked for Campbell?

A. It was July.

Q. July.

A. Yes, sir.

Testimony of W. E. Wilder

741 Q. Do you remember how long it was that you worked for him?

A. No, not at this date I don't, but it was something like three weeks that I worked for him during July.

Q. During the period you were working there did you have any trouble with the coal miners, the members of the Benedict local there?

A. No, sir, I did not.

Q. Did you leave Campbell's job there?

A. No, sir. Campbell quit the job and automatically the job was over.

Q. In other words, the job ended and that is why you left there?

A. That is right.

Q. Did you have any occasion to speak to Campbell about the time he left that job?

A. About the time?

Q. About when he left there, when he was quitting?

A. No other than about one time, the date he quit, he came back up to the shop where I was working and said that "This is the last, we are not working any more."

Q. Did he say why he was not going to work any more?

A. He, well, maybe I ask him the reason, and he said that the company claimed that they were running short of money and they weren't going to continue the job.

742 Q. Now, did you speak to anyone of the company about Campbell?

A. Not that I remember.

Q. I will ask you if you ever had any occasion to speak to Bob Fortner about Campbell?

A. Bob Fortner came to the shop that afternoon, that was the first I knew Campbell was leaving.

Q. Tell us who Bob Fortner is.

A. He was at the present, I suppose, the superintendent of the mine at that time and main mine foreman.

Testimony of John Paul Newton

Q. What did he have to say to you?

A. Well, he said that Campbell wouldn't be there any longer, that the company more or less run him off.

Mr. Rayson: I see. You may ask him.

Cross-Examination, by Mr. Milligan.

Q. Mr. Wilder, when did you go there?

A. It was in June, last of June and the month of July I worked there. I am not positive of the date I left it or I am not positive of the date I went there, but I think it was in July.

Mr. Milligan: That is all. Come down.

(Witness excused.)

743

JOHN PAUL NEWTON,

called as a witness by and on behalf of the cross-defendants, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Rayson:

Q. What is your name, please?

A. John Paul Newton.

Q. Where do you live, Mr. Newton?

A. St. Charles.

Q. What is your business?

A. Coal miner.

Q. What mine do you work for?

A. Right now I am not working at any at all. We are grounded out. Work at small truck mines.

Q. Mr. Newton, I will ask you if during some time in 1952 you ever worked for a man named Campbell?

A. Yes, sir.

Q. Where were you working for Campbell?

A. At Benedict.

Testimony of John Paul Newton

Q. Do you remember what part of the year that was?

A. Somewheres in July, I am pretty sure.

Q. How long did you work for Campbell?

A. Three weeks.

Q. What were you doing?

744 A. We were building a bucket line.

Q. How many of you were working there for Campbell?

A. About four of us. Four to five each week.

Q. That is in addition to Campbell himself?

A. Yes, sir.

Q. Mr. Newton, while you were there working for him did you have any difficulty with the coal miners there at the Benedict mines?

A. No, sir.

Q. Did they cause you any trouble of any kind?

A. No, sir.

Q. Did Campbell say anything to you about any trouble down there?

A. No, sir.

Q. Did you have occasion to talk to Campbell about the time he was hiring you?

A. Yes, sir. When he hired me it was that I would be used for contract. The men had been used for contract, a contract to be signed.

Q. Whose men, his men?

A. Campbell's men, and I asked him if there was any confusion when I went to work, and he said none whatsoever, the contract was signed.

Q. Were you a member of the union at that time?

A. Yes, sir.

745 Q. Were you a member of the Benedict local?

A. No, a member of the Monarch local.

Q. Did you ever join Benedict?

A. No. The job ceased before we had time to get a transfer card.

Testimony of Guy B. Darst

Q. You say you worked for him three weeks. What was the occasion when you left Campbell there?

A. Well, he came to us the afternoon that we quit. He said, "This is it, boys. The company says they don't have money to go on with the job."

Q. Was that all he had to say about it?

A. Yes, sir.

Q. Did he pay you?

A. Yes, sir.

Mr. Rayson: You may ask him.

Mr. Winston: Stand aside.

(Witness excused.)

Mr. Kramer: I want to call Mr. Darst, please.

Mr. Milligan: If your Honor please, I would like to ask counsel if he is putting on Mr. Darst as his witness? We closed in chief.

Mr. Kramer: I am putting him on for further cross-examination with reference to Exhibit No. 8, and for that reason alone, your Honor. Shall I proceed?

The Court: Yes, sir.

746 Mr. Milligan: Go ahead.

GUY B. DARST,

a witness on behalf of the defendant-cross plaintiff, was recalled and further testified as follows:

Cross-Examination, by Mr. Kramer.

Q. Mr. Darst, I hand you here four compilations of figures which you have loaned to us that we might check on your Exhibit No. 8.

A. Yes, sir.

Q. I believe those are the same ones you gave me the other day. I want to take this Exhibit No. 8, I want to take this first column—and, incidentally, Mr. Darst, there are two loose sheets you called my attention to when you

Testimony of Guy B. Darst

handed me one of the books. I am not sure which book, but I hand them back and you may re-insert them.

A. That is what I was trying to do.

Q. The first item at the top, running across this page, is the April 14-17 work, stoppage or strike. The last one is May 18. I want to take one or two figures on two or three places, and some others, and find where they come from.

I notice that on this first item of April 14 and 17th, 1950, you have out in the next to the last column, the 5th column, under the heading "X Tons" a figure of 23,044.

Will you take your book that you have there in front of you from which records you tell me you got this data and point out to me where those figures appear in those records as the number of tons.

A. As I explained it the other day that is the sum of the actual tons mined plus the average daily production for two days lost and added into it. That number does not appear in these statements.

Q. In other words, that number of tons was not mined?

A. No, sir. 20,468 tons was mined.

Q. 20,468?

A. 20,468.

Q. Point-five?

A. Point-five. I have left off the fractional part.

Q. A part of a ton.

A. Yes.

Q. You told us your figure used a constant overhead, that there was a reduction in cost of tons mined, or would have been.

A. Yes, sir.

Q. And the difference between the actual cost and calculated cost based on constant overhead of 15.7 cents per ton on the coal mined?

A. That is correct.

Q. So that the amount of reduction was not, assuming

Testimony of Guy B. Darst

748 your overhead figure is correct, was not on 23,044 but was on how many tons that you had actually mined?

A. You have to have the extra tonnage that was lost in order to calculate the reduction.

Q. You did not pay any labor and that cost, and you considered labor as constant according to these figures, and the only charge which you made was the overhead, is that not right?

A. That is correct.

Q. So that the tons that you had actually mined or put out was 20,468 tons, wasn't it?

A. Yes, sir.

Q. Now if you say you save 15.7 cents on the tons mined—you did not save it on the tons not mined because they were not mined—on the tons actually mined, the figure wouldn't be \$3,617.90 but what would it have been?

A. It might help clarify matters if I explained—

Q. I think we understand. You answer first my question then if you want to make any explanation you may.

A. No. The 15.7 cents times 20,468 tons, which is the tonnage actually mined and not counting the tonnage lost, would of course make a less figure there but had we not had the strike the tonnage would have been mined.

Q. This will only take about a half minute. Will you take a sheet of paper, there, lay it on the book there, and just figure out what that would run on the tons you
749 mined in place of the \$3,617.90.

A. You mean the 15.7 cents times the actual tons?

Q. The 15.7 cents times the tons actually mined.

A. Have you multiplied this out? It will save me some trouble.

Q. I have.

A. Give me the answer.

Q. I want you to check one or two of mine at random so we won't disagree.

Testimony of Guy B. Darst

A. I had rather not expose my ineptness with figures without an adding machine.

Q. Go ahead, I don't have any degree in mathematics.

A. I get, subject to mistakes in mathematics, \$3,213.476—\$3,213.47.

Q. \$3,213.47 instead of \$3,617.90. Just take one more as an illustration.

A. Does that check with your answer?

Q. Yes, I think about maybe a two cent difference. That is near enough. I want to take just one more as an illustration.

I want to take this October 16-28, 1952 strike or work stoppage in which the difference was 72.6 cents.

A. I can't see it from here.

Q. 72.6 cents. Will you tell us what the figure was from your book. You will have to get it out of your book.

750 A. Yes.

Q. Of the coal that was actually mined.

A. That is October, 1952?

Q. October, 1952.

A. Tons mined, actual, 9,489.

Q. 9,489 tons?

A. Yes, sir.

Q. That is what I have. All right. Tell us what that would figure, the 9,489 tons on this basis, a difference of 72.6 cents on 9,489 tons. What do you get?

A. Pardon me for being so slow. I did all of these with a machine before. I get \$6,880.01.

Q. Will you subtract, that is, in place of \$11,306.65, which is the figure you have shown here as loss, the other figure assuming that the other is the loss figured on the tons actually mined, and tell us the difference?

A. \$4,426.64, I guess.

Q. According to my figures you have \$9.00 more. I have \$4,417.64—it is \$4,426.64 less. If you figure that by the

Testimony of Guy B. Darst

same formula you have used, and assume for the purpose of this question it is correct, that would be figuring the saving on the actual number of tons mined, is that right; is that correct?

A. The way that was arrived at——

Q. Wait, but is that correct, then make any explanation.
751

A. I didn't quite get what you asked.

Q. If you figure the saving which you say you would have had in overhead per ton if you could have worked every day that mine was closed.

A. The savings, yes, would be——

Q. Would have been \$4,400 less than what you figure here?

A. Yes, seventy-two and six——

Q. Less than this. It would have been some \$4,400 less?

A. Transposed over, yes. Total tons multiplied out would be that much, but we lost the nine days production.

The whole theory of this thing is that increased tonnage, lost tonnage, which would have increased the tonnage would have made a lower cost on the total amount.

Q. I am coming to that. In taking the difference of these, and all of these, of course, they are substantially less, isn't that right?

A. Well, yes, but it wouldn't be as big a proposition on that one.

Q. No, I think we have checked the largest and the next to the smallest. They are not uniform, of course.

A. No, it is different for each month.

Q. Because it depends on the number of tons you
752 actually mined and depends on this differential which is not a constant figure each month.

A. Correct.

Q. Now, Mr. Darst, the mine was operating at a loss evidently each month that is involved here with the exception of two, wasn't it?

Testimony of Guy B. Darst

A. Of the months posted there?

Q. Yes, sir.

A. Without checking, we were operating at a loss, yes.

Q. I will ask you if you will look at your figures——

A. Profit and loss does not enter into this thing. It is the difference in cost. Whether or not we made any money or not was something aside from this. The losses were really caused from various things, one of which was the disturbing factor of many, many strikes not all of which are shown here; the fact we were making a new coal mine.

Q. All right. But what happened was, of course, you were running at a loss, but if you had operated this number of days you say you were shut down by a strike, you say the loss would have been less, and, therefore, the economic position of your company would have been better?

A. That is right.

Q. That is your theory?

A. I might explain this, the company—I would have to look it up—had some profit from its store and filling
753 station operation. Enough a lot of the time to keep them in the black and absorb the losses in the coal mine.

Q. Let me take as an illustration what I am talking about so that we will understand. On these records, I am just going to leaf through here and see if I can find some at random.

A. Which one do you want?

Q. Here is one. I have opened to September, 1950, that is within this period. What does the report of your loss per ton that month show?

A. Loss on coal operations alone was 84 cents and a fraction.

Q. 84.9, wasn't it?

A. Yes.

Q. That is in that month alone.

Testimony of Guy B. Darst

A. Let me explain.

Q. Just a moment. There is not any loss considered here on this month of September in which you operate at a loss of 84.9 cents per ton. For every ton you put out in the month of September, 1950, you lost 84.9 cents, didn't you?

A. That is correct. Let me explain that, if you will.

Q. All right.

A. The loss would have been that much less as shown on the chart there, and in that—this may sound like
754 a big figure to the jury and Court—that was during the period when we were transposing from working out those seams of coal and moving into the others as I explained.

Q. Let's just take some other illustration and get away from that and let's see what it shows. I will pick this one at random and see what we get.

This is the page which shows August, 1952. Tell us what your operations were in August, 1952, and I notice that you show there is a stoppage.

Let's take a month with no stoppage in it. Take March, 1952. That one has red marks on it.

A. That is the slack season.

Q. Very well. You pick one that has no red marks on it, and you pick it for me. Pick it at random without trying to pick the best one.

A. Find a month we ran full.

Q. Take September, 1952. I don't know what it shows, but there are red marks on September.

A. September, 1952?

Q. All right.

A. The mine made \$199.85 in the black on coal, or a cent and a half a ton.

Q. That is one month you made one and one-half cents a ton. Let's go to February, 1953.

A. February, 1953—wait a minute, that is January—
755 February, 1953. Net gain, No. 5 mine——

Testimony of Guy B. Darst

Q. You are talking about one mine that is in operation?

A. That is the only mine we were operating at that time.

Q. All right. Get one where you were operating all of them. All right.

A. Net gain 10 cents a ton, or \$1,047.00.

Q. Let's take April, 1953, what is your report?

A. Where does it show the net? Here it is. The per ton was 96 cents and a fraction, nearly 97.

Q. 96.8, wasn't it?

A. That's right. A total loss of \$6,300.00. That is when we begin to go over the hill and downgrade, though.

Mr. Kramer, I might explain too that the loss, you expect to have losses in the spring of the year when the price of coal goes down. It is a seasonal business, you understand that.

Q. Yes, sir. Your sales begin to pick up about the first of July, don't they?

A. That is right. In the summer. Of course, business is best from about August on through January.

Q. Take just one more so we don't take too much time up on this. November, 1952, which is the best part of the year and in which you will notice there was no work stoppage. What does the record show?

A. Record shows actual, 58 cents loss.

756 Q. A little more, a fraction, 58.2 cents?

A. I haven't been reading the mills.

Q. 58.2 cents. Now, Mr. Darst, in figuring these, taking into consideration these figures I have gone over—did you also check for accuracy on these figures by putting in a projected figure of what the overhead was, which is the same regardless of the number of tons you produce or regardless of shutdowns?

A. That is right, it would be the same constant figure.

Q. The fixed charges go on whether you run or don't run?

Testimony of Richard A. Giebel

Q. In other words, his column here says \$6.24, and your fourth column says the same \$6.24?

A. That is correct.

Q. And you have followed that throughout, assuming his figures to be correct?

A. Yes.

Q. Go ahead.

A. And utilizing his figures we made computations in the next column.

Q. What is that column?

A. Average projected gain or a loss per ton, and
775 again the losses are stated in parenthesis—the average gain or loss per ton, which is merely a subtraction of this figure from this figure (indicating).

Q. In other words, that is a loss or profit—you say gain—a loss or profit per ton, the difference between these two figures?

A. That's right.

Q. All right.

A. Then working on his figures once again we have taken the projected total of sales for this period, which would be the average sales price multiplied by the total projected tonnage.

Q. You are assuming he would have sold all the projected tonnage at his average sales price?

A. That is correct. Then we use the same in this column. The projected total cost represents his figures for the average projected cost per ton as obtained from the second column in Exhibit No. 8.

We have multiplied the total projected tonnage that he has listed in his fourth column of Exhibit No. 8, multiplied both of his figures to come out with the projected total cost, which is listed in this column. This figure was arrived at strictly by us—by multiplying his average cost per ton by the tonnage, the projected tonnage.

Testimony of Guy B. Darst

A. Right.

Q. Now, did you take those fixed charges, a total per month for any of these months involved here, and, incidentally, I notice that none of these so-called work stoppages ran over the 31st of any month, did they?

A. No, none shown there. We had two or three that did.

Q. I am taking what is in this record.

A. I was just going to say that is the way it turned out.

Q. Did you take the amount of overhead, the amount that cost to mine just the actual tons that you actually mined to get your total cost of operation, including depreciation, amortization and depletion, and did you take the same figure of what that total cost would have been had you mined the number of tons you have shown here which you say would have been mined had there not been a stoppage or strike, then subtract the difference between that to find out how much variation there would be in these figures?

A. I worked at it a little backward. I left in the cost per ton. I only took out the overhead items.

I did not mess with or take out or do anything. I just assumed, after the overhead was figured out for the entire month, the cost per ton would have been the same on the lost tonnage and left it alone, and took the tonnage and divided it into the total overhead cost.

Q. Now, much of this time you did not have sales orders for all of it but you say you did have for this month of May down here, which was the Lake order proposition. You just figured that the sales price per ton would have been uniform with the rest of that month.

A. No.

Q. In other words, your record there shows you had some coal that went to the customer at \$3.75, some at \$5.50, some at \$7.00.

Testimony of Richard A. Giebel

Q. We keep saying "this column." In order that
776 there will not be confusion in the record, I am
going to take the liberty, although the exhibit has
been filed, of numbering the respective columns, as they
appear on Exhibit No. 39 numbered from one through
nine.

Now tell us again about which column you were talking
about. Talking about column No. 7, what did you say
it was?

A. Column No. 7 is the product of column No. 3 multi-
plied by column No. 4 gives us the projected total cost.

Q. In other words, assuming that his figures for cost
are correct per ton, and assuming that he did produce
the number of tons he has used in making his calculations,
his total cost of producing that coal in each of these
months would be the figure shown in column No. 7?

A. Yes, sir.

Q. Go ahead.

A. Column 8 represents the projected gain as a result
of extending—well, actually subtracting column 6 from
column 7, or in the event of a gain would be column 7
subtracted from column 6.

Q. It is the difference of what he would have received
for sales as he says, and what it cost him to produce it
as he says?

A. That is correct.

Q. And if it resulted in a gain, if there were profits
777 during that month, it will show in column 8?

A. That is correct.

Q. If there was a loss it will show in column 9?

A. That is correct.

Q. Go ahead.

A. So it is merely a case of subtraction between these
items in the columns to come out with an extended figure,
either a loss or a gain, and I have segregated those in
separate columns, and there are three instances of gains.

A. Different grades, it would not be uniform.

Q. So as to get the cost per ton average—I mean sales price per ton, you took all the number of tons so
758 shown in that record and averaged it up and got the average sales price per ton.

A. Some of this \$3.75 may have been \$4.00 coal and some of it \$3.50 coal.

Q. That is what I thought, and you used that in arriving, you made no adjustment for the changes in price in arriving at the figures.

A. The price did not figure in it at all.

Q. Now let's come down to this "other Loss Due to Abandonment of Construction," this figure of \$21,534.85. Do you have anything here that I can check on that?

A. In my car, sir.

Q. Tell me what—

A. It does not reflect in these figures. We have an account we call capital account. I did not go into the cost figures at all because we were building something permanent, that was going to last for years and be of use, and it would be in the capital account, and put into that a depreciation figure at 5 percent per year.

Q. Well, the 5 percent, that is what?

A. I don't know whether that would be the rate or—

Q. Assume it was 5 or 12, whatever the Federal Government allows for income tax purposes as that depreciation rate on the Campbell investment I will call it, has it been figured in out of part of the overhead in these figures here?

759 A. No, sir. Our depreciation rate has remained as a constant figure in total dollars per month. We were allowed to charge out \$2,000.00 a month depreciation by the Federal Government, and this would merely have prolonged the depreciation by so many months.

Q. So that this item really of \$21,534.85 is not an item

of loss but would have gone over a long period of time, the same as an overhead item.

A. It is an item of loss because we never got one single dollar's worth of use out of it.

Q. In your income tax returns for the year of 1953 did you take that on an income tax basis as an item of loss, that \$21,534.85?

A. No, sir, we did not. We did not have enough income to pay any taxes.

Q. And that was not taken as an item of loss, did you?

A. The loss would be spread out over seven years.

Q. An amortization basis of maybe 16, 20, 5 or 12, 8, whatever it was, and would not be an item of loss at this time, would it; couldn't be?

A. Yes, the money was spent out and lost.

Q. Spent out as a capital investment?

A. Yes, sir, and, of course, absolutely no use from it.

Q. There was included that rope we talked about,
760 and the timbers and the labor of Campbell, and that sort of stuff?

A. The rope, Mr. Kramer, is not even in that. I forgot to put it in. That is a conservative figure of what that abandonment of construction cost the company.

Q. Is that item of \$21,534.85 set up on one page of that book-down in your car?

A. No, it would be spread over the month's period.

Q. Is there any sheet on which that \$21,534.85 is itemized?

A. I don't think so. I might not be able to find it myself, but if there is a bookkeeper around who knows books—that is a sum total of about 14 months, or however long it was Campbell worked there, of expenditures.

I would be glad to try to find it for you if you want me to.

Q. As I understood this last item that we talked about

Testimony of Guy B. Darst

the other day here, and which is the penciled figure, the Court and jury might not be able to see, but it is this figure of \$3,632.50. Do you remember what those two items are—you made that up of two figures the other day.

A. Yes, sir, we took out a figure.

Q. Took out \$5,382.50 and put in \$3,632.50. What makes up the \$3,632.50?

A. That is profit from coal. I can find that in a
761 minute, if you let me get the file. That is profit from coal we were buying and processing.

Mr. Kramer: It was not in these books that we had, your Honor.

The Witness: Yes, it is.

Mr. Kramer: I couldn't find it, but go ahead.

The Witness: The amount of tonnage that we lost by not getting to buy it and making 55.3 cents per ton.

By Mr. Kramer:

Q. You stated this consisted of two items, one you listed as profit lost on processing coal, 2,500 tons at 55.3 cents per ton, or \$1,382.50. I don't understand that 2,500 tons.

A. We lost it.

Q. Who were you buying it from?

A. We were buying and processing it from the various truck mines that have the same kind and grade of coal as ours. Put it through our tippie, screen and prepare it and put it into the more expensive grades by doing that and thereby making 55.3 cents a ton.

Q. Was that the Big Mountain operation?

A. No. This is the item of the Big Mountain operation (indicating).

Q. The item of the Big Mountain operation is the other of \$2,250.00?

762 A. That's right.

Q. This \$1,382.50 you have here would be contracts with other operators?

Testimony of Guy B. Darst

A. Well, yes. We had two or three what we call truck mines on our own property at Benedict, around in another hollow, where a fellow was doing a little mining and bringing the coal to us.

Q. You mean they brought it to you and you ran it through your tippie for classification and processing?

A. That's right, and thereby made a little profit on it of 55 cents. This represents the tonnage we did not get to buy, based on the average of the tonnage we were buying at that time.

Q. As I understand, the reason you say you did not get to buy it was because your tippie was not in operation?

A. That's right, we were on strike.

Mr. Kramer: That is all, your Honor.

Redirect Examination, by Mr. Winston.

Q. Mr. Darst, you spoke of this figure as being cost money you put into that Campbell project. What is the value of that to Benedict now?

A. It is of no value to Benedict now or its lessee.

Q. Was the job completed?

A. No, the job was not completed. Far from completed. About half completed.

Q. You also spoke of the fact of losing rope. I believe you gave the value of that. What is it, sir?

A. I think I stated it was, the price to replace that rope would be about two and a half—between two and a half and three dollars a foot.

Q. What is the length of it?

A. As I recall 2,400 feet.

Q. Would you total that up, sir.

A. Then which figure—I will multiply by the two and a half figure.

Q. The lesser figure. Is that rope you had on hand, you already had that rope on hand?

Testimony of Guy B. Darst

A. We already had it on hand.

Q. Total it up, sir.

Mr. Kramer: We will admit that two and a half times 2,400 is 6,000.

Q. Will you take a pencil and put that at the bottom of this Exhibit; you say it is not included in there. Put it at the bottom of this chart.

A. Right here (indicating)?

Q. Yes, sir.

A. (Witness marks on Exhibit No. 8.)

Q. What is that figure, sir?

A. Cable, lost cable.

764 Q. I just want to ask you a question to simplify your explanation that you gave to Mr. Kramer on your examination. He asked you about this tonnage. This is actual tonnage plus tonnage you would have had had there been no strike, is that correct?

A. That is correct, based on the average production per day.

Q. Had there been no strike and you had had that increased tonnage then the cost per ton would have been lower?

A. Exactly.

Q. In other words, an increased tonnage at a reduced cost?

A. An increased tonnage at a reduced cost.

Mr. Winston: That is all.

Recross-Examination, by Mr. Kramer.

Q. In other words, you had that rope on hand a long time?

A. It had been on hand from a hoist.

Q. It was used property?

A. No, it was brand new, still encased in the original drum with grease and oil on it.

Testimony of Richard A. Giebel

Q. From the hoist?

A. From the incline hoist, yes.

Mr. Kramer: That is all.

765 The Court: That makes a total figure, I understand, of claimed damages as \$81,017.60?

The Witness: May I ask a question. I made a mistake of 8 cents in this total the other day.

The Court: Well, correct that then.

By the Court:

Q. Mr. Darst, that means you have changed the 60 cents to 68 cents there in the total, and the direct cost figure is now \$75,017.68, and as I understand it to which you have added today \$6,000.00 and that making a grand total of \$81,017.68 as claimed damages; is that right?

A. That is correct, direct damages. No indirect damages figured in.

(Witness excused.)

RICHARD A. GIEBEL,

called as a witness by and on behalf of the cross-defendants, after having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Kramer.

Q. How do you sign your name?

A. Richard A. Giebel.

Q. Would you spell your last name?

A. G-i-e-b-e-l.

Q. Your age, please?

766 A. Thirty years.

Q. Your occupation.

A. Accountant.

Q. By whom are you employed?

A. By the United Mine Workers Welfare & Retirement Fund.

Testimony of Richard A. Giebel

Q. By the United Mine Workers Welfare & Retirement Fund in the office in Washington, D. C.?

A. That is correct.

Q. Of the International?

A. That is correct.

Q. How long have you been employed there?

A. I have been employed eight years.

Q. Prior to that what was your experience in accounting or in the field of that nature?

A. I was an assistant office manager and I was also employed in a bank.

Q. In Washington or elsewhere?

A. At Washington, D. C.; that is correct.

Q. Mr. Giebel, have you taken a copy of this Exhibit No. 8 that is here on the blackboard and made a study and attempted to make an analysis of it for me in the last day or two?

A. Yes, sir, I have.

Q. Have you had access to these records that Mr. 767 Darst, four volumes of them which I believe are headed "Operating Statements for the years, 1950, 1951, 1952 and for the first half of 1953"?

A. Yes, sir.

Q. I don't believe you had any records from which you could ascertain the item of \$21,534.85, another expense item?

A. No, I have not been able to locate the figure.

Q. Have you prepared a calculation based upon the actual number of tons that Mr. Darst's records show, or the Benedict Coal Corporation's records show, were actually produced during these particular months that are listed here, being the months of April, 1950, September, 1950 and other months which are not consecutive ending with May, 1953?

A. Yes, sir, I have.

Testimony of Richard A. Giebel

Q. In place of taking an assumed number of tons or projected number, whatever you want to call it, have you figured the amount of difference, assuming his calculation is correct, by using the actual number of tons rather than a projected or assumed number of tons produced, and calculated what that so-called loss would have been on that basis?

A. Yes, sir.

Q. Do you have a copy of it there?

A. Yes, sir, I have a copy.

Q. Do you have on that calculation that you have there

Mr. Kramer: I am going, your Honor, to remove
768 these so I can put this up.

The Court: All right.

By Mr. Kramer:

Q. There is an assumed or projected, we call it, production during this month of April, 1950 for his first item going from the top of this Exhibit 8 down, of 23,044 tons.

What was the actual production according to Mr. Darst's records, or Benedict Coal Corporation records?

A. I have a figure of 20,468.5.

Q. Tons?

A. Tons.

Q. Did you figure, assuming his other figures are correct but that there was a reduction, would have been a reduction of 15.7 cents if he had produced the number of tons they claim lost because of strikes, what would this amount, this figure in the last column of \$3,617.90, based on 23,044 tons, what would it have been if it had been based on the 24,468 tons?

A. I have that it would be reduced by \$404.35.

Q. What you have is the amount less that it would be?

A. That is correct.

Q. It would be less than this first item of \$404.35?

Testimony of Richard A. Giebel

A. Yes, sir.

Q. Take the second period and take the actual ton-
769 nage in place of some projected figure and what
would it have been?

A. The actual cost or reduction would have been
\$615.07.

Q. In other words, the \$615.07 is less or subtracted
from the \$4,075.18?

A. That is correct.

Q. And the third one?

A. \$545.89.

Q. And the fourth one?

A. The fourth one would be \$205.93.

Q. And the next one.

A. \$1,733.92.

Q. That much less?

A. That is correct.

Q. The next one?

A. The next one would be \$351.11.

Q. All right.

A. The next one would be \$195.37.

Q. All right.

A. The next would be 260.15.

Q. All right.

A. \$224.69.

Q. All right.

A. \$4,417.64.

770 Q. That is the one Mr. Darst calculated a minute
ago and said we had a slight difference on it.
\$4,417.64 less than \$11,306.65.

A. The last one is \$3,354.99.

Q. Did you total those figures?

A. Yes, sir.

Q. How much less was the total, using the actual tons
produced, assuming his other figures are correct, how
much of a reduction would that give over his figures?

Testimony of Richard A. Giebel

A. \$12,309.11.

Q. Of course, in that reduction you have not taken into consideration the two items that he had on for abandonment of construction, or the Campbell item, or the \$3,632.50 item which he says was a purchase coal item?

A. No, sir, I have not taken those into consideration.

Q. Aside from those, using actual tons produced and assuming his other figures are correct, the amount would be \$12,309.11 less than his figure?

A. Yes, sir.

Q. Now in calculating the figures that Mr. Darst has used, has he taken into consideration total cost of operation during these months, and total sales price of coal, and including both what he actually had and projected figures?

A. He has taken into consideration his total projected sales. He has not taken into consideration—he has
771 not taken into consideration the total results of his operation, I should put it that way.

Mr. Kramer: Your Honor, I want to go back and file the tabulated sheet that is equivalent to what is on the board.

(Exhibit No. 37 was filed.)

By Mr. Kramer:

Q. Have you prepared some charts in which you have taken his same figures as his actual cost per ton from his books, and his cost per ton assuming his overhead is correctly calculated as given in this chart; his difference of cost as given in this chart, and taken his total figures and made charts from it?

A. Yes, sir, I have.

Q. Will you bring those charts down here and put them on the blackboard, please.

A. (Witness complies with request of counsel.)

Mr. Kramer: We have placed on the blackboard here in front of the Court and jury, three different charts, you

Testimony of Richard A. Giebel

might call them really one collective group. The first one we have had marked, your Honor, as Exhibit No. 38, and I want to show it so filed.

(Exhibit No. 38 was filed.)

Mr. Kramer: We have marked the next one as Exhibit No. 39, and I want to show it so filed.

772 (Exhibit No. 39 was filed.)

Mr. Kramer: And the last one has been marked as No. 40, and I want to show it so filed.

The Court: All right.

(Exhibit No. 40 was filed.)

Mr. Kramer: Mr. Giebel, I don't believe you can see from there, can you?

The Witness: Not too well.

The Court: You may go to the board.

By Mr. Kramer:

Q. Now, Mr. Giebel, will you explain, take first the chart No. 38 and explain that to the Court and jury.

A. Yes, sir. This chart represents a computation of the actual tonnage mined, the average sales price, actual sales price per ton—

Q. Where did you get the actual tonnage mined?

A. From the records that were made available, the cost records.

Q. You got this average sales price from the same record?

A. Yes, sir.

Q. Assuming the correctness as found in his records?

A. Yes, sir.

Q. Go ahead.

773 A. This is the average actual cost per ton as extended also from the records. I made this computation which merely shows the loss or gain. The loss is the parenthetical one, per ton on all production.

These are the actual sales figures obtained from the records. This column represents the actual costs that were

Testimony of Richard A. Giebel

also obtained from the same records. Therefore, ultimately it gives a loss figure, or as in two instances your actual gain figure—or the actual loss and the two actual gains.

Q. When you say "actual loss" or "actual gain," is that the figures for the first month of April, 1950, in the last two columns on the right?

A. Yes, sir.

Q. Are they the same months indicated in his column No. 1 on his Exhibit No. 8?

A. Yes, sir.

Q. Now, what have you done on Exhibit No. 39?

A. On Exhibit No. 39, from the information provided by this chart, we have taken the total projected tonnage—

Q. This figure in the second column of 23,044 being the same figure he has in his last blue column on Exhibit No. 8?

A. That is correct.

Q. Is that true all the way down on the total projected tonnage, you assumed his figures to be correct on that?

774 A. That is correct.

Q. The next column on there.

A. The average sales price per ton, which is identical with the average sales price—the actual average sales price per ton obtained from his records, and that follows for the succeeding months.

Q. The next.

A. We have taken his figures again as provided in the second column of the chart.

Q. Second column of Exhibit No. 8?

A. Exhibit No. 8.

Q. Which is the per ton cost if there had not been, as he says, those work stoppages?

A. That is correct.

Q. In other words, three instances which he would have made a profit during those respective months if his other figures be correct, cost and sales price and he had mined and sold that amount of coal?

A. That is correct.

Q. What three months would he have made a profit on this group in Exhibit No. 8, there being 11 months of them; which ones would he have shown a profit?

A. On Exhibit No. 8?

Q. Yes. On Exhibit 39.

A. He does not extend—

Q. But you do in the way it has been projected, on which ones would he have shown a profit?

A. On the month of July, 1951, November, 1951, and October, 1952.

Q. All right. And on the other eight out of 11 he would have shown losses?

A. That is correct.

Q. And the amount of damages being shown in column No. 9?

A. That is correct.

Q. What have you done on Exhibit No. 40?

A. On Exhibit No. 40 we have placed the losses claimed that are itemized in column No. 5.

Q. Of Exhibit No. 8?

A. Exhibit No. 8.

Q. In other words this column 1 on Exhibit 40 has figures corresponding with column 5 on Exhibit 8, the last column on Exhibit No. 8?

A. That is correct.

Q. They are identical all the way through?

A. That is correct.

Q. The first one being \$3,617.90, and the last one on here, which is on a monthly basis, being \$8,393.26?

A. That is correct.

Q. Go ahead with the next column.

A. This next column, I prefer, if we could do it, to project in this third column.

Q. You may do that if you think it would be so everybody will understand this.

A. This column 3 is based—

779 Q. On Exhibit No. 40?

A. Column 3 of Exhibit No. 40 is based upon the difference as arrived at between column 9 of Exhibit No. 39, and this would be column 9 of Exhibit No. 38—the difference between the actual loss and the projected loss, that \$14,563.81 from the first month of Exhibit No. 39, column 9, and column 9 of Exhibit No. 38.

Q. And gives you this difference?

A. \$14,563.81 and \$16,151.61 would give this difference.

Q. Is this figure, which is the figure in column 9 of Exhibit No. 38, the actual figure given on the books of Mr. Darst?

A. Correct.

Q. This figure, which is the figure in column 9 of Exhibit No. 39, is what would appear on the books if he figured his total selling price and total cost assuming that he produced the amount he claims was lost by the work stoppage?

A. That is correct.

Q. And the difference between those two figures is shown in what column?

A. Column 3.

Q. Column 3?

A. That's right, on chart 40.

Q. Mr. Darst on his Exhibit No. 8 showed that Benedict had a loss for that month of \$3,617.90. If he carried through his figure, assuming his cost per ton and sales price per ton is correctly stated on his books, and he had been able to mine and sell the projected amount of coal, what would his loss have been?

780

Testimony of Richard A. Giebel

A. It would have been column No. 3.

Q. And for this month of April, 1950, in place of being \$3,617.90 what would it have been?

A. Been \$1,587.81.

Q. How much is the difference?

A. \$2,030.09.

Q. What is the difference for the second month, the second period he claims a work stoppage in September, 1950, what is the difference?

A. In column 2 of Exhibit No. 40 it is \$1,757.11.

Q. In other words, the actual loss, assuming everything else to be correct, would be how much?

A. \$2,218.07.

Q. And his figure shows \$4,075.18?

A. That is correct.

Q. I don't know that we need to take the time to go through each one, but every one is shown on there.

Let's take October, 1951, and give us the figures as given you.

A. October, 1951, loss claimed is \$6,651.01.

Q. Appearing in the last column of figures on Exhibit No. 8?

A. That is correct.

Q. If he carried through his actual costs, assuming his figure is correct, per ton and sales and cost of operating, what would it have been?

A. He would have lost \$4,715.24.

Q. In place of \$6,651.01?

A. That is correct.

Q. A difference of how much?

A. A difference of \$1,935.77.

Q. Let's go down and take October of 1952.

A. October of 1952, the loss taken from his chart shows \$11,306.65.

Q. What was the actual loss if he had taken—

Testimony of Richard A. Giebel

A. Actual loss was \$9,667.51.

Q. A difference of how much?

A. \$1,639.14.

Q. Is the \$1,639.14 the correct figure of what the loss would have been?

A. That is right. That is the correct figure.

Q. That is the correct figure that would be in place of what he shows here as how much, October, 1952, in which he shows \$11,306.65?

A. Yes.

Q. In other words, the difference is \$9,667.51?

782 A. That is correct.

Q. Take the last month, May of 1953.

A. May of 1953 the loss claimed for his Exhibit No. 8 is \$8,393.26.

Q. If he actually figured through what would his loss have been?

A. \$475.44.

Q. How much additional is there added in outside of the actual loss if he had carried through, assuming his costs and sales price are correct?

A. \$7,917.82.

Q. How much difference or how much added loss in addition to what the actual loss would have been, again assuming his figures to be basically correct, how much additional if he included in his figures, that is the actual loss even assuming correctness of the cost and sales price and projected production?

A. \$18,501.60.

Q. In other words, that amount should be deducted from his total even if everything else is correct?

A. That is correct.

Q. He has a total now of \$81,017.68. Will you put that figure over here, please—before you put that figure over there, what totals have you got here for the corrected figure?

Testimony of Richard A. Giebel

783 A. \$18,501.60, the corrected figure.

Q. In other words, \$18,501.60—I believe I misstated that question a moment ago—\$18,501.60, assuming his other figures to be correct, would have been his loss?

A. This would be his loss. This is the amount that is inflated, this is the correction, the corrected figure. This figure is inflated.

By the Court:

Q. \$31,248.73, Mr. Witness, is that what, according to your figures, his claim loss should have been?

A. That is right, sir.

Mr. Kramer: Now, your Honor, I do not want to mislead someone. That does not include the other two items.

The Court: That does not include your \$21,534.85 and the figure there of \$6,000?

Mr. Kramer: Nor the \$3,632.50. Those three items, your Honor.

The Court: All right.

By Mr. Kramer:

Q. But this \$31,248.73, you say is the amount rather than the figure that is used here?

A. That is correct.

Q. You did not have any access to the other figures, you say, under which this abandonment of construction, or what we know as the Campbell loss, was involved?

784 A. No, sir.

Q. Well, just for the purpose of giving everyone the correct figure or picture, although we do not concede the accuracy of his figures, but assume that he has a loss proven of \$21,534.85 for this abandonment of construction—put it on there and add it to your figure over there of corrected loss for these other monthly periods—in other words, put it below, \$21,534.85, and add in the \$3,632.50 and add the \$6,000 item claimed for a lost cable, and will you total those figures, please, sir. And in place of being

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\$81,017.68, assuming everything else to be correct; it would be what amount?

A. \$62,416.08.

Q. I note on this Exhibit No. 40 two figures in red, one for July of 1951 and the other for November of 1951. Why are those in red when the others are black?

A. Those figures represent the gain he would have received had he continued in operations.

Q. I am wondering whether we have been accurate in what we have done. You said that the total savings was \$1,587.81 on the first one and the correct figure was \$2,030.09. I thought these were losses or gains that he would have had in lieu of these figures here, and that this column No. 2 on Exhibit No. 40 was the total of the losses rather than column No. 3. I thought this was 785 the savings, am I mistaken; were you correct in what you said or am I confused?

A. The third column represents the amount of costs he would recover by continuing operation. He would gain.

Q. If he recovered the amount of this figure here then this middle figure is actually his loss, is it not, or am I wrong? Just get me straight. I want you to tell me the facts. I thought that this corrected figure you got from the subtraction of these two columns over here gave you the corrected loss figure?

Mr. Milligan: If your Honor please, this man has qualified himself as an expert. I don't think he should cross-examine his own witness and try to confuse him. I don't know that he can do it successfully, but we object.

The Court: Overrule the objection.

By Mr. Kramer:

Q. Come on down here and point it out. The Court said to answer the question. Just set me straight if I am wrong.

I thought that column No. 1 on Exhibit No. 40 is the figure that he claimed as a loss; is that not right?

A. That is correct.

Testimony of Richard A. Giebel

Q. Column No. 2 is the figure that you figured as the correct figure of his loss assuming that he has given
786 correct costs for operation, correct sales price, and that this was his loss on the projected amount of coal.

A. This is a correction—this is a corrected column (indicating).

Q. That is what I thought.

A. This is a correction of this figure here.

Q. All right. That is what I thought.

A. You actually come up with the real projected loss.

Q. Show me, will you please, how you got each of these two figures, the one in column 3 and column 4 on that exhibit.

A. We will start with column 3.

Q. Start with column 3 and explain where you got that figure there.

A. The actual loss in column 9 of Exhibit No. 38 was \$16,151.61.

Q. That is the actual loss as his books show it for the month of April, 1950?

A. That is correct.

Q. Go to the next figure.

A. Following through we have ascertained if there was a continued operation there would have been a projected loss of \$14,563.81.

Q. In other words, his loss would have been less. He would still had a loss for the month if he could have produced what he said he would have produced except
787 for the strike, but his loss would only have been \$14,563.81 in place of \$16,151.61?

A. That is correct.

Q. So his loss would have been how much less?

A. His loss would have been \$1,587.81.

Q. Less?

Testimony of Richard A. Giebel

A. That would be his actual loss had he continued. This figure is offset against this one.

Q. Yes, sir, and when you subtract them you get a difference of this, do you know?

A. His loss had been increased by this amount.

Q. He says it had been increased by this amount and this is the amount it would actually have been increased, is that right, or is this the amount?

A. This is the amount it actually would have been increased.

Q. Which is the amount that it actually would have been increased?

A. His loss would have been increased in the amount of \$1,587.81.

Q. That is what I thought. Then this is not the amount of his increase, is it?

A. No, it is not the amount of his increase, that is correct. That is the difference between column 1 and column 3, losses sustained had operations continued on this projected basis. This is the difference, this figure represents the differences—all these figures represent the difference in column 2, the amount this figure is inflated.

Mr. Kramer: All right, you may cross-examine.

Mr. Milligan: If your Honor please, we would like to ask the Court for a short recess to give us an opportunity to study this.

The Court: We will take a short recess then.

(A short recess was had.)

The Court: Proceed, gentlemen.

Cross-Examination, by Mr. Milligan.

Q. Mr. Giebel, are you a certified public accountant?

A. No, sir, I am not.

Q. Are you a graduate of any accounting school or schools?

Testimony of Richard A. Giebel

A. Yes, sir.

Q. What?

A. I am a graduate of Georgetown University, School of Business Administration. Bachelor of Science in Business Administration, majoring in accounting.

Q. And your accounting experience has been confined, as I understood, with respect to your association with the United Mine Workers Welfare Fund; is that correct?

A. Not exclusively, no.

789 Q. What other experience have you had?

A. I have worked in bookkeeping in the commercial banks, and I have worked as assistant office manager which entails accounting work for a large ice cream manufacturing company, and I have done outside public accounting work.

Q. Have you had any experience in accounting for coal mining operations?

A. Only to the extent of specific audits.

Q. You mean you have audited coal mines?

A. Yes, sir.

Q. Would you mention some of the mines you have audited?

A. Heil Coal Company.

Q. Where is that located at?

A. In Pennsylvania. Heil Coal Company in Pennsylvania.

Q. What was the purpose of that audit?

A. To ascertain a royalty delinquency.

Q. That is a comparatively simple calculation, isn't it, a royalty based on either 30 or 40 cents a ton of the coal produced other than house coal?

A. It is. The calculation is relatively simple but the audit is rather difficult.

Q. Am I correct in my premise as I have propounded to you, sir, is that correct?

Testimony of Richard A. Giebel

A. No, sir. The ascertaining of the royalty figure
790 is very difficult. The actual royalty figure in many instances does require a rather special type of audit.

Q. It requires the multiplying of the number of tons produced by 40 cents, doesn't it; isn't that about the extent of it?

A. If we had the figures to work with that is what it would be.

Q. That takes no particular skill or mathematical knowledge, does it?

A. Yes, sir, because we have to ascertain, we have to arrive at those figures by utilizing audit procedures which require specialized skill.

Q. To multiply 40 by the number of tons?

A. No, sir, to actually verify costs, tonnage mined, and to review the financial records of the organization.

Q. Well, that is not necessary in order to determine the amount of royalty; they don't take into consideration production cost, do they?

A. All financial records have a bearing on ascertaining the amount of royalty.

Q. Is it your statement that in arriving at the royalty that is to be paid the Welfare Fund that production cost is taken into consideration?

A. We do get into production costs in order to verify the tonnage mined.

791 Q. Then if it should appear that during a given month that the mine operated at a loss no royalty would be due, production cost was above the sales price, is that correct?

A. No, sir. The royalty would be due.

Q. I beg your pardon.

A. The royalty would be due.

Q. And it is due regardless of whether the mine is making or losing money, is that right?

Testimony of Richard A. Giebel

A. That is correct.

Q. And it is based solely and alone upon the tonnage, excluding house coal and one or two other little items, isn't that correct?

A. Yes.

Q. In your calculations you have taken into consideration as a basis for arriving at your conclusion the operating costs? I mean, the profit or loss represents whether or not the mine was operating at a profit or at a loss?

A. Yes, sir.

Q. And the cost of production of coal on the minimized basis resulting from the strike and a lesser production on a tonnage basis, you found to be higher, that is on a per ton basis, than if operation had continued on the projected basis, is that correct?

792 A. If the operation had continued on the projected basis the unit cost would be lower.

Q. If the operation had continued on a projected basis the unit cost would be lower.

A. Yes, sir.

Q. Now taking that into consideration, you of course had made available to you this Exhibit No. 8, did you not?

A. Yes, sir.

Q. Using the strike of April 14 and 17 as an example, taking into consideration the actual cost per ton, that is, what the tonnage actually cost to produce disregarding any business interruptions or any strike, is that correct?

Mr. Kramer: The witness is straining to see, your Honor.

The Court: You may go to the board.

By Mr. Milligan:

Q. Can you see the figures there?

A. Yes, sir.

Q. Take this figure in this first column, \$6.397 that is under the heading of Actual Cost Per Ton. That is with-

Testimony of Richard A. Giebel

out regard to the interruptions. In other words, if they ran 14 days that month and produced X-number of tons of coal that is what it cost. You understand it that way?

A. That is the cost per ton of actual production.

Q. And when I say unit cost, I mean per ton, that
793 is the unit we are referring to. The cost per ton if production had not been lost was reduced from \$6.39 to \$6.24—I am leaving off the mills—is that correct?

A. That is correct.

Q. And that makes a differential of 15 and a fraction cents lower in the projected column than in the actual column, is that right?

A. That is a difference, that difference as you have stated it.

Q. And this, as I understand it, is a projected number of tons that would have been produced taking an average of what had been produced on X-number of days; you understand it that way?

A. Yes.

Q. And that of course comes to this total. The same formula was followed through all of the months shown. Now if I may ask you, using the month of April you show an actual tonnage of 20,468.5 and an average sales price and average cost price which shows an average loss on that operation of 78 cents a ton with your actual sales and total cost and an actual loss of that many dollars, \$16,151.61?

A. Correct.

Q. And then down here you have a comparison on a projected basis of \$14,563.81, is that correct?

A. Yes, sir.

794 The Court: You are referring to what exhibit, Mr. Milligan?

Mr. Milligan: For the purpose of the record, my first inquiry of what the auditor has done was Exhibit No. 38,

Testimony of Richard A. Giebel

and then he pointed out to Exhibit No. 39 and then you come up with your conclusions in Exhibit No. 40?

The Witness: Yes, sir.

By Mr. Milligan:

Q. What is based on the figures that are set forth in Exhibits 38 and 39?

A. Yes, sir. With one exception. This loss as claimed is taken from your exhibits.

Mr. Milligan: I understand. You may have a seat.

If your Honor pleases, we would like to reserve the right to recall this witness. I think that is as far as I can cross-examine him at the moment.

The Court: Well, how long do you want that reservation to extend?

Mr. Milligan: Well, if your Honor please, this trial has been going on four days and they had these books for two days and they were offered to them months ago, but this is the first opportunity we have had to see the figures and as your Honor can well tell I did not have the privilege of going to an accounting school when I was in law school, and so we are under the same handicap.

(A discussion was had off the record.)

The Court: You may have it. Mr. Milligan, I will give you time until the case closes.

Mr. Milligan: We do not expect to ask an adjournment, anything of that kind.

The Court: All right. I will do that.

Redirect Examination, by Mr. Kramer.

Q. Mr. Giebel, you said you were not a certified public accountant. Have you done any work toward your certificate or letters as a certified public accountant?

A. Yes, sir.

Q. Just tell us what you have done.

A. I have passed four out of five parts of the certified

Testimony of M. M. Campbell

public accountants' examination in Maryland, which is a uniform examination throughout the United States, including a part of accounting theory.

Q. You take those examinations in parts and you have taken four and passed them and you have one part to take in order to be a certified public accountant?

A. Yes, sir.

Q. That is under the uniform system throughout the United States?

796 A. Yes.

Mr. Kramer: That is all, your Honor.

Mr. Milligan: As I say, Mr. Kramer, I may want to recall him.

(Witness excused.)

Mr. Kramer: We rest, your Honor.

The Court: Is there anything further from the defendant-cross plaintiff?

Mr. Milligan: Just a minute, your Honor. We want to recall Mr. Campbell.

M. M. CAMPBELL,

a witness called by the defendant-cross plaintiffs in rebuttal, having been previously sworn, was examined and testified as follows:

Redirect Examination, by Mr. Milligan.

Q. You are the same M. M. Campbell that has heretofore testified in this case?

A. Yes, sir.

Q. And the same Mr. Campbell that had a contract with Benedict Coal Corporation to build a bucket line?

A. Yes, sir.

Q. You know Mr. Condra who was an official of District No. 28?

A. Well, I met Mr. Condra one time in person.

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797 Q. Was that the time you signed the contract?

A. Yes, sir, at the office at District 28 in Norton, Virginia.

Q. Did you ever telephone him at any time or have any conversations with him at any time after the date you signed that contract?

A. No, sir. I never called Mr. Condra or the District office at any time by telephone.

Q. Did you ever say to Mr. Condra or to anyone else that Mr. Darst was trying to squeeze you out on this operation and make it rough or hard on you?

A. No, sir, not to anyone at any time.

Q. To Mr. Condra or anyone else?

A. No, sir.

Mr. Milligan: That is all, you may cross-examine.

Mr. Kramer: No cross-examination, your Honor.

Mr. Milligan: Come down.

(Witness excused.)

Mr. Milligan: The defendant and cross-plaintiff rests, your Honor.

The Court: All right, anything further?

Mr. Kramer: Nothing, your Honor. I assume he closes.

Mr. Milligan: We will waive the further cross-examination of Mr. Giebel.

798 Mr. Kramer: There are some matters we would like to take up with the Court out of the presence of the jury.

The Court: Yes. Let the jury step out.

(Whereupon, the following proceedings were had out of the presence of the jury, to-wit:)

Mr. Kramer: May it please the Court, the first motion that I desire to make is on behalf of the Trustees, the original complainants.

We are moving that the Court withdraw the case from the jury and pass on the case in line with the previous mo-

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tion for summary judgment, and I do not want to reargue something your Honor has already heard.

Second, that your Honor direct the jury to return a verdict in favor of the Trustees for the reasons heretofore given, and I will outline them very briefly.

We insist, your Honor, that this is a charitable trust, that there could be no offset against it for any alleged damages that the Benedict Coal Corporation may have suffered; that if they suffered damages by reason of any strikes, whether that strike be in violation of the contract, violation of Section 303 of the Labor Management Act, or whether those strikes be wholly unauthorized and outside of the contract provisions, that there could be no liability.

799 And we go further to that and say that in addition to these general grounds that the proof fails to show any ratification or authorization or even acquiescence on the part of the International Union even if claims could be set off against it, which we insist there cannot be, or the District.

The Court: Well, I am of the opinion, Mr. Kramer, that that motion will have to be overruled.

Mr. Kramer: It is not necessary, of course, under the Federal procedure to reserve an exception.

Now our second motion is, your Honor, that your Honor direct a verdict in favor of the United Mine Workers of America, International, and District No. 28. Of course, the local union is not a party to this litigation. We think there is no proof upon which, in this case, that there was any breach of contract on the part of the International or the District.

(Whereupon, counsel presented argument to the Court.)

Mr. Kramer: It is our next position on this motion, your Honor, that certainly some of these strikes or work stoppages are outside the veil of the contract. We do not

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think the general language which was referred to in previous argument, even the best efforts clause, and others, are applicable on such occurrences as this water strike which occurred over the water shortage, and
800 therefore that whether a directed verdict be given as to all the issues it should be given as to that and that portion withdrawn.

The next one I want to point out particularly is with reference to the Wage Stabilization action, that your Honor recalls occurred in October, 1952, that the contract provides even in the best efforts clause and the other clauses in the Agreement, that they are not applicable where such disagreements are national in character. This we insist was national in character. It happened in all coal fields, and there could be no violation of these wage agreements on that one. Which, incidentally, your Honor, is the heaviest one involved in the entire period so far as the cross-plaintiffs claim for damages is concerned. We insist they should be withdrawn from the jury.

And one more thing, your Honor. We do not think, your Honor, that these facts show any violation of Section 303, and as to the alleged liability on that it should be withdrawn from the jury.

The Court: What do you gentlemen say about the work stoppage that occurred at a time the gentlemen were discussing the Wage Stabilization action in Washington, Mr. Winston?

(Whereupon, counsel presented argument to the Court.)

801 The Court: Bring the jury back in.

(Whereupon, the jury returned to the court room and the following proceedings were had in the presence of the jury.)

The Court: Mrs. Stansberry and gentlemen, the parties have closed the proof in the case. That leaves the argument of counsel for each side and the Court, with the

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agreement of counsel, has allotted 45 minutes to each side to argue the case, and at the conclusion of the last argument the Court will charge the jury, and the Court at this time is excusing the jury until 9:00 o'clock in the morning, but Court has not adjourned.

Keep in mind the instructions, lady and gentlemen, don't talk about the case among yourselves while you are out of the court house; don't let anybody talk to you of course, and if there is anything in the newspaper about it do not read it, over the radio or television, turn off those instrumentalities of news, don't listen, and I do not anticipate anything being on the radio or television about the case, but you are excused until 9:00 o'clock tomorrow morning.

(Whereupon, the jury was excused until 9:00 a. m. the following morning, and the following proceedings were had in the absence of the jury, to-wit:)

Mr. Milligan: Now comes the defendant in the 802 original action, Benedict Coal Corporation, and moves the Court to peremptorily instruct the jury to return a verdict in favor of the defendant and against the plaintiff Trustees on the ground that there was a material breach of the contract on the part of the beneficiaries of the trust and as a consequence the Trustees are not entitled to recover any amount in their action.

The Court: I am of the opinion that motion has to be overruled. I am of the opinion there are issues here the jury must decide.

Mr. Milligan: Then, if the Court please, I would like to make this further motion. Comes the cross-plaintiff and moves the Court to direct a verdict in its favor against the cross-defendant in this action on the ground that there is no evidence in the record which would sustain a defense to this action, and the only issue to be submitted to the jury is the amount of the damages sustained by the cross-plaintiff, Benedict Coal Corporation.

Court's Charge to the Jury

(Whereupon, counsel presented argument to the Court.)

The Court: I have to overrule the motions of the original defendant and the cross-plaintiff. Also, the Court overrules all motions.

Unless you show me in the morning, I intend to
803 charge the jury that they cannot allow a penalty:

Adjourn Court until tomorrow morning at 9:00 o'clock.

(Whereupon, at 5:30 p. m. court adjourned until 9:00 o'clock a. m., Friday, March 23, 1956.)

Fifth Day of Trial.

Friday, March 23, 1956.

(Whereupon, at 9:00 a. m., Court reconvened pursuant to adjournment, when the following proceedings were had in the presence of the jury, to-wit:)

The Court: Gentlemen, I take it you waive the call of the jury before the argument starts?

Mr. Milligan: Yes, your Honor.

Mr. Kramer: Yes, your Honor.

(Whereupon, counsel presented their oral arguments to the jury.)

805 (Whereupon, the Court charged the jury as follows:)

The Court: Mrs. Stansberry and gentlemen of the jury, the complaint in this case was filed by John L. Lewis, Charles A. Owen and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund, against the Benedict Coal Corporation, defendant, to collect royalties on coal mined by the defendant during the period from March 5, 1950, through and including September 30, 1952, at the rate of 30 cents per ton, and during the period of October 1, 1952, through and including July 31, 1953, at the rate of 40 cents per ton.

Court's Charge to the Jury

In 1950 the United Mine Workers of America and its District 28 entered into a contract with the Benedict Coal Corporation and other coal operators, which contract was designated as "National Bituminous Coal Wage Agreement of 1950." This contract was amended by an agreement executed by the United Mine Workers of America and Benedict Coal Corporation on December 23, 1952, through their proper officials.

The contracts provide for the payment of royalties by the coal corporation at the rate of 30 cents per ton for the first period indicated and 40 cents a ton for the second period indicated. Plaintiffs base their claims on the original contract and the contract as amended.

The provision of the original contract relating to 806 the welfare retirement fund is as follows:

"It is hereby stipulated and agreed by the contracting parties that there is hereby created a Fund to be designated and known as the 'United Mine Workers of America Welfare and Retirement Fund of 1950.' During the life of this Agreement, there shall be paid into such Fund by each operator signatory hereto the sum of thirty cents (30c) per ton of two thousand (2,000) pounds on each ton of coal produced for use or for sale. Such Fund shall have its place of business in Washington, District of Columbia, and it shall be operated by a Board of Trustees, one of whom shall be appointed as a representative of the Employers, one of whom shall be appointed as a representative of the United Mine Workers of America and one of whom shall be a neutral party, selected by the other two. In the event of resignation, death, inability or unwillingness to serve of the Trustees appointed by the United Mine Workers of America; the Operators shall appoint the successor of the Trustee originally appointed by them and the United Mine Workers of America shall appoint the successor of the Trustee originally appointed by it.

Court's Charge to the Jury

"The Operators signatory hereto do hereby appoint Charles A. Owen, of New York City, as their representative on said Board of Trustees. The United Mine
807 Workers of America do hereby appoint John L. Law~~er~~ of Washington, D. C., as its representative on said Board of Trustees. It is further stipulated and agreed by the joint contracting parties that Josephine Roche, of Denver, Colorado, is appointed as the Neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Fund herein created."

This provision of the contract was amended as of September 29, 1952, so as to provide for the payment of 40 cents per ton, beginning October 1, 1952.

Under the law of contracts, when one party is placed under obligation to render certain services, or make certain payments, the obligations to be enforceable must have been supported by consideration, that is, some obligation by the other party. Under the provisions of the contract heretofore quoted, the obligation was placed on the Benedict Coal Corporation to pay into the welfare fund 20 cents and later 40 cents for each ton of coal it produced. This obligation had, or had not, binding force upon the coal company depending upon whether some corresponding obligation was placed upon the other parties to the contract.

By referring to the contract itself, we find the following:

808 "Settlement of Local and District Disputes.

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

Court's Charge to the Jury

"1. Between the aggrieved party and the mine management.

"2. Through the management of the mine and the Mine Committee.

"3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

"4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

"5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America,

and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

"A decision reached by any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to re-opening by any other party or branch of either association except by mutual agreement."

The contract provides that it is an integrated instrument and that its respective provisions are interdependent. This means that all undertakings of the contract are binding on the parties thereto and if one party breaches the contract, such breach may be set up as a claim for damages against the party so breaching, or as a set-off against any claim that may be made by the party who breaches the contract.

As heretofore stated, the plaintiffs are suing for royalties on the coal produced by the defendant. The defend-

Court's Charge to the Jury

ant coal company admits that the alleged tonnage of coal was produced and that \$76,504.21 of the royalties allegedly due thereon have not been paid, but says that it is not liable for the payment because the contract was broken. The breach alleged by defendant involved both the local union and the United Mine Workers of America through its agents, the representatives of District 28.

810 It appears from the contract that the welfare fund provisions contained in it were for the benefit of the coal miners themselves, including the employees of the defendant, said employees of it being also members of the United Mine Workers. Defendant says that its employees, who had their own local Union, No. 6372, breached the contract.

As heretofore quoted, the contract provided administrative procedure for settlement of any disputes under the contract that might arise between the coal miners and the coal company. This administrative procedure did not contain any provision authorizing the miners to indulge in strikes as a means of coercing the coal company into accepting their demands respecting contract obligations. Defendant says that nevertheless the miners, operating through their local Union, disregarded the administrative procedure of the contract and instead engaged in a number of strikes. Defendant further says that because the miners in the breach of contract indulged in unjustified strikes, defendant was relieved of its obligation to pay royalties into the retirement fund.

The defendant further says that the contract was broken by the United Mine Workers of America, herein for convenience referred to as the international union, through its agents, the representatives of District 28. The contract executed March 5, 1950, effective from

811 March 5, 1950, to June 30, 1952, contains a provision whereby the international union obligated itself in the event of a dispute between the coal miners and

Court's Charge to the Jury

the coal company to use its good offices to settle such dispute amicably. That provision is quoted herewith:

Miscellaneous Provisions.

"3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry.

"4. The United Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement."

This sub-section 4 which I have just read, by amendment was stricken or eliminated from the 1950 contract, and sub-section 3 which I have just read was amended by the September 29, 1950, contract that became effective on October 1, 1952, as follows:

"Amend 'Miscellaneous' by striking out sub-section 4 and amending sub-section 3 to read as follows:

"3. The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore prac-

Court's Charge to the Jury

tiiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts."

"Amend 'Miscellaneous' by adding thereto the following, to become sub-section 4:

"4. Each operator signatory or who may become signatory hereafter agrees to give proper notice to the President of the local union at the mine by the 18th day of each month that said Operator has made the required payment to the United Mine Workers of America Welfare and Retirement Fund for the previous month."

813 The unions say that Benedict broke this provision of the contract and that this breach was the cause of the work stoppage or strikes that began on May 18, 1953.

Defendant says that the international union and the district agents not only did not live up to the quoted provisions but that the district agents suggested, encouraged and ratified strikes.

Defendant says further that their employees, District 28 and the international union violated what is commonly known as the secondary boycott provision of the Taft-Hartley Act in that they placed secondary pressure on the employees of M. M. Campbell, an independent contractor who was doing work for defendant, and the employees of the Big Mountain Coal Company, which was operated by a man by the name of Swisher under that trade name of Big Mountain Coal Company, another independent contractor who also did work for the defendant, and thereby caused strikes among the employees of these independent contractors which resulted in damages to the defendant.

The pertinent provisions of the Taft-Hartley Act relating to secondary boycotts are as follows: "Section 303 of

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the Labor Management Relations Act"—that is commonly referred to as the Taft-Hartley Act—

“Section 187, Title 29, U. S. C. A., involved herein, provides in part as follows:

814 “(a) It shall be unlawful . . . for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to . . . work on any goods . . . or to perform any services, where an object thereof is—

“(1) forcing or requiring any employer . . . to cease using . . . or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person;

“(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees . . . ;

“(3) forcing or requiring any employer to recognize or bargain with a particular labor organization . . . ;

“(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization . . .

“(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States without respect to the amount in controversy.

815 or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.”

As a result of these strikes which allegedly had the character of secondary boycotts, defendant coal company says it was unable to pay all the royalties which would have been due to the welfare fund. These alleged breaches of contract and violations of the secondary boycott provi-

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sions of the Taft-Hartley Act are pleaded by defendant as a defense to this action of the trustees to collect the royalties specified in the contract. Moreover, defendant says that because of these strikes the United Mine Workers of America and District 28 owe the defendant \$81,017.68, or more than the defendant owes the plaintiff trustees.

What has heretofore been said pertains principally to the original action of the trustees to recover unpaid royalties to the welfare fund and the defenses relied on by defendant to defeat that action.

We now come to the cross-action filed by the Benedict Coal Corporation against the United Mine Workers of America and its District 28 for breach of the same contract upon which the original suit is based. Grounds for the cross-claim are the strikes and secondary boycotts heretofore mentioned. Certain evidence has been offered tending to show that during the period of the 1950 contract and during the period of that contract as 816 amended, there were a number of strikes at defendant's mines which were in violation of the contract and which caused damages as claimed by defendant.

Defendant Benedict Coal Corporation claims that these strikes were the result of various disputes that arose between the employees and Benedict and that they were used by the miners in forcing their demands on Benedict. Benedict also claims that the action of the miners in using these strikes as a means of enforcing their demands were suggested, encouraged and ratified by field representatives of District 28 and possibly other district officials. Benedict claims further that the members and representatives of the cross-defendant international union and District 28 disregarded the machinery set out in the contract for adjudication of disputes but permitted and encouraged the strike method to be used instead. There is also evidence that the United Mine Workers of America failed to exercise its best efforts through available disciplinary meth-

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ods to prevent stoppages of work by strikes pending adjustment or adjudication of the disputes and grievances in the administrative manner prescribed by the 1950 contract as claimed by the defendant.

Benedict claims that the following work stoppages or strikes occurred. A strike on April 14 and 17, 1950, which has been referred to by the witnesses as the lay-off strike at No. 7 mine.

Another on September 27 and 28 and 29, 1950, which 817 has been referred to as the strike over the water problem.

Another on January 10th and 11th, 1951, which has been referred to by the witnesses as the Collingsworth strike.

Another July 30th and 31st, 1951, referred to as the vacation pay strike.

Another October 1st through October 8th, 1951, referred to as the cut-off of credit strike.

Another on November 2nd and November 7th, 1951, which has been referred to as the discharge of Tabor strike.

The complainants and cross-defendants admit all of these work stoppages except the one that occurred on November 2nd and 7th, 1951, known as the Tabor strike, which strikes are denied by the original complainants and cross-defendant.

Another on February 7th, a one-half day strike, and February 8th, 1952, known as the M. M. Campbell strike or the secondary boycott strike.

Another on April 24th and 25th, 1952, also known as the Campbell strike or the secondary boycott strike.

Another on August 5th and August 6th known as the discharge of Anders and Roarke strike, in 1952.

Another on October 16th through October 28th, 1952, known as the increased wages strike.

Another beginning May 18th through May 27th, 1953,

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as claimed by the Benedict Coal Corporation and which is also known as the secondary boycott strike involving this man Swisher, or the Big Mountain Coal Company.

Now the complainants and cross-defendants say that although some workmen were off duty on May 18, 1953, that returned to work on May 19th, 1953, and offered to go back to work at that time but Benedict would not permit them to go back to work at that time.

Benedict Coal Corporation claims that as a direct and proximate result of these work stoppages it sustained damages in the total amount of \$81,017.68. The complainants and the cross-defendants deny that they sustained that much damage as a result of these strikes.

The unions and the trustees say that if the figures on the blackboard, which you observed yesterday and which were allegedly taken from the books of the Benedict Coal Corporation, except the figures of \$21,534.85 and the other of \$3,632.50 and the other of \$6,000.00—I say, the unions say that if those figures are correct, which they don't admit, that by proper calculation the damages would only amount to \$62,416.08.

Cross-defendants, United Mine Workers of America and its District 28, deny that they violated any provision of the contract. They also deny that they violated the Federal statute against secondary boycotts or any other provision of the statute. They deny that they are liable to

Benedict for any amount of damages or otherwise.

819 The jury's attention is again directed to the claim of the trustees for the royalties allegedly due the welfare fund under the contract and the defenses relied on by Benedict to defeat this claim. The parties have agreed on the tonnage of coal produced by Benedict during the period of time involved in this litigation. There is no dispute as to royalties already paid by Benedict under the contract. The controversy between the trustees

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and Benedict relates not to the amount of unpaid royalties, but to Benedict's asserted excuse for not paying them.

In determining whether Benedict was justified in withholding further payment of royalties, the jury is required to decide:

• First, did the miners employed by Benedict violate the contract to which I have heretofore referred and portions of which I have quoted.

Second, if they did violate it—and when I refer to the contract I refer to it as amended—in what amount, or amounts, was Benedict damaged as a direct and proximate result of such violations.

Under the common law rule, breach of contract results in liability for two classes of damages: (1) Such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they entered into the contract, as a probable result of the breach of it.
820 (2) Such damages as may fairly and reasonably be considered as normally and naturally flowing from a breach of the contract.

This was a contract which purported to govern relations between a coal mine operator and the miners who dug the coal. The pertinent question is, what kind of damages did the parties have in mind as likely to occur in the event of a strike or work stoppage? Also, what kind of damages would they have fairly and reasonably considered as naturally and normally flowing from strikes or work stoppages. The damages that actually resulted were a matter of evidence. Yet there are certain kinds of damages reasonably foreseeable as normally and naturally following a work stoppage, such as the expense of closing down the mine and starting it up again, or the expense of maintaining it in stand-by condition, or in operating it at a reduced capacity, with a possible loss of markets as the result of inability to meet contracts for

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the sale of coal, or loss of orders for coal because of inability to make delivery within a reasonable time, or inability to compete for markets accessible to the operator.

These are merely suggestions as to the kind of damages that may reasonably be supposed to have been in contemplation of the parties or that may normally and naturally have resulted from a breach of the con-

821 tract. Loss of profit is a recoverable item of damages, provided such loss is proved. The jury may

not supply the lack of such proof by speculating that a loss of that kind occurred. Any damages allowed must be based on proof or the reasonable inferences from established facts and cannot be based upon conjecture or guess.

In this connection it is the alleged breach of the contract by the coal miners themselves by their strikes and failure to follow the procedure prescribed by the contract which are relied on by the coal company as justification for discontinuing the payment of royalties into the trust fund.

If the international union and its representatives suggested, encouraged or instigated the strikes, such fact is material only as an additional justification for non-payment of royalties. What the international union and representatives did is material however in the second phase of the lawsuit, namely, the coal company's cross-claim against them. It is that phase of the case that now requires additional attention.

Neither the individual employees nor the local union is being sued. The cross-claim is against the international union, namely, United Mine Workers of America, and against its agent, United Mine Workers of America, District 28.

As heretofore stated under the first phase of this suit, Benedict claims that during the period of the 1950 contract and that contract as amended there were a
822 number of strikes at this mine which were in breach of contract and which caused severe damage to the

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coal company. There has been evidence introduced tending to show that these strikes were the result of various disputes that arose between Benedict and its employees. The contract, from which pertinent quotations have been made, required disputes to be settled by an administrative procedure set out in the contract, which requirement was a part of the consideration of the contract.

I therefore charge you that if you find that the local coal miners employed by Benedict used these strikes as a means of settling their disputes and forcing their demands on Benedict, and if you further find that these actions were encouraged, suggested or ratified by the field representatives of District 28, or other officers or agents of District 28, then the defendants, United Mine Workers of America and District 28, would be liable for the damages resulting from such strikes.

I further charge you that if you find that the representatives of United Mine Workers of America failed or refused to use their good offices, as provided in this contract for the adjudication of these disputes, or any of them, or if you find that defendant unions failed to exercise their best efforts through disciplinary methods during the period covered by the 1950 contract, namely, from March 5, 1950, to June 5, 1952—keep in mind at this point

that the union did not contract to use disciplinary methods to prevent strikes after June 30, 1952—to prevent stoppage of work by strikes, or to use their best efforts to settle the strike issues by administrative procedure as those unions had agreed to do, then the unions breached the contract in those respects. If you find that Benedict was damaged by breach of contract, there should be a verdict for Benedict for the amount of damages thus sustained.

We now come to another phase of the case pertaining to the cross-action of Benedict. In this connection Bene-

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dict claims that three of the strikes were secondary boycotts. Benedict says that the strike of one-half day of February 7th, a whole day on February 8th, 1952, was an effort to force M. M. Campbell to sign a contract with the union, and that the strike of May 18, 1953, was an effort to force the Big Mountain Coal Company to sign a contract with the union, which contract would have required the employees of the Big Mountain Coal Company to become members of the local unions.

In this connection, it is unlawful in an industry or activity affecting commerce for any labor organization to engage in or encourage the employees of another employer to engage in a strike where the object thereof is to force those employees to join a particular labor organization, unless such labor organization has been certified as
824 the bargaining representative of such employees as provided by the Taft-Hartley Act.

In this case the United Mine Workers of America was not certified as the representatives of the employees of M. M. Campbell or of the employees of Big Mountain Coal Company. Therefore, if you find that the strikes which were held at the mines of Benedict were induced or encouraged by the agents of United Mine Workers of America and were for the purpose of forcing M. M. Campbell or the Big Mountain Coal Company to recognize or bargain with the United Mine Workers of America, then the United Mine Workers of America has violated the law against secondary boycotts. If you further find that Benedict has been injured by such violation, Benedict would then be entitled to damages from the United Mine Workers and its District 28.

Evidence has been offered tending to show a strike at Benedict on April 24th, 25th and 26th, 1952, called in order to force M. M. Campbell to employ some of the cut-off Benedict miners to do construction work, although it

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is claimed that these men were not qualified for the kind of work to be done.

In this regard, you are instructed a strike called for the purpose of requiring any employer to assign particular work to employees in a particular trade rather than to employees in another trade, unless such employer is
825 failing to employ in accordance with an order or certification of the National Labor Relations Board, would be a violation of the Taft-Hartley Act. And if you find that the Union in this regard has violated that law and that the Benedict Coal Corporation has been damaged thereby, then Benedict would be entitled to damages from the union and its District 28 for such violation.

With respect to the responsibility of the Union for the acts of its representatives and officers, you are instructed that a labor union can act only through its officers and agents and it is responsible for acts by its officers and agents done within the scope of their authority or employment. An agent is one who by the authority of his principal transacts his principal's business or some part of it, and represents his principal in dealing with third persons.

In determining whether ~~Mr.~~ E. L. Scroggs, Mr. Allen Condra or Mr. M. W. Clark, or any other agent of District 28 was acting as an agent of the United Mine Workers of America or of District 28, United Mine Workers of America, so as to make the international union and District 28 responsible for their acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The contract introduced in evidence shows that the
826 third step of settlement of a local and district dispute is "through district representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company."

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There has also been evidence introduced as contended by the cross-defendants showing that the agents of District 28 were trying to organize the employees of M. M. Campbell and Big Mountain Coal Company at the time of those disputes. If you find that while performing the acts alleged the officers or field representatives of District 28 were carrying on work provided by the aforementioned contract or were carrying on organizational work, then you are instructed that both the United Mine Workers of America and District 28 are responsible for those acts done by them.

If you find from a preponderance of the evidence that these strikes alleged, or any part of them, were violations of the contract by the unions or if you find that they were secondary boycotts, as I have defined that term to you, for which the unions are responsible, then the Benedict Coal Corporation is entitled to recover the damages which it sustained because of the strikes, or because of those strikes which you find were such violations.

Benedict claims it has presented to you certain evidence indicating the amount of damages that it suffered as a result of these particular strikes. If you find that 827 Benedict is entitled to recover damages caused by any of the strikes, then you are instructed that, in ascertaining the damages it suffered, a reasonable estimate based on relevant facts is proper. You may not render a verdict based on speculation and guess work but you may make a just and reasonable estimate of the damages based on the data which you may deem relevant.

By way of summary, the jury will note that the Court has discussed the claims made by Benedict of certain contract violations which are relied on by Benedict as a defense against the claims of the trustees in the original action. Also discussed have been the alleged breaches of contract and alleged law violations because of which

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Benedict seeks to recover damages from United Mine Workers of America and District 28. These alleged violations are divided into two groups: First, the alleged breach of the contract; second, the alleged violation of the Taft-Hartley Act, in particular its secondary boycott provisions.

Referring again to the first phase of the suit which is the suit of the trustees to collect unpaid royalties for the welfare fund, I charge the jury that if you find from the evidence that neither the employees of Benedict which belonged to the local union, nor the United Mine Workers Union or its District 28, violated the provisions of the contract, or the secondary boycott provisions of the §28 Taft-Hartley Act, then your verdict should be in favor of the original plaintiffs, namely, the trustee, for the amount of the unpaid royalties, namely, \$76,504.21.

On the other hand, if you find from a preponderance of the evidence that there was a breach of the contract either by the miners employed by Benedict or a breach by the United Mine Workers and/or its District 28, or if you find that either the employees of Benedict or the United Mine Workers or its District 28 violated any of the secondary boycott provisions of the Taft-Hartley Act, and that as a direct or proximate result Benedict sustained damages, you should determine the amount of the damages, the amount so determined would be off-set against the claim of the trustees for royalties in their original action. The verdict then should be for the plaintiff for the amount of the unpaid royalties, less the amount of the off-set. If the off-set exceeds the amount of the unpaid royalties, the verdict should be that the trustees recover nothing.

Referring again to the phase of the suit that pertains to the cross-action, I charge you that if you find from a preponderance of the evidence that the United Mine Workers and or its District 28 breached their contract

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with Benedict, or violated the secondary boycott provisions of the Taft-Hartley Act, or any of them, and if as a direct and proximate result Benedict sustained damages, then Benedict would be entitled to a verdict in its favor on its cross-action against the United Mine Workers and District 28. If you find in favor of Benedict on its cross-action then you should award damages in its favor under the rule heretofore explained as applicable to damages for breach of contract, but you should not award damages against the international union or its District 28 that was caused solely by the act or acts of the local union or its individual members.

Mrs. Stansberry and gentlemen of the jury, the burden of proof in this case is upon Benedict to show breach of contract or breach of the Taft-Hartley Act by secondary boycott and that it sustained damages as a direct result of such breach or breaches and the amount of such damages before there can be a set-off against the claim of the trustees or before there can be any recovery against the international union and its District 28 under the cross-action.

Burden of proof and preponderance of evidence ordinarily have reference to direct evidence and indirect evidence, or circumstantial evidence. Direct evidence is that contained in the testimony of a witness to a fact, the knowledge of which the witness acquired through his own senses. Indirect evidence is that knowledge which is inferred from known facts. It is not permissible to draw an inference from another inference. However, it is permissible to draw reasonable inferences from proven facts.

830 Sometimes direct evidence falls short of proving the final or all-important fact which a party seeks to prove. However, it is sometimes possible to prove facts of such significant or related character that the final or

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conclusive fact can readily be inferred from what has been proved. This is what is meant by proving a case by circumstantial evidence.

Where the burden of proof rests upon a particular party, he is required to prove his claim by a preponderance of the evidence. Preponderance means, merely, the greater weight of the evidence. A plaintiff, or cross-plaintiff, who is required to make out his case substantially as alleged, must meet his obligation with the greater weight of the evidence. The balance must be tipped in his favor. If the evidence swings the balance more heavily on the defendant's side, or cross-defendant's side, the plaintiff or cross-plaintiff must fail. Also, if the evidence is in a state of even balance, the plaintiff or cross-plaintiff must fail, because in that event the parties are in the situation they had before they started.

Mrs. Stansberry and gentlemen, you are the sole and exclusive judges of the testimony and of the weight and credibility that you will give to the swearing of each and every witness in the case, and in weighing the evidence you will look to the demeanor of the witness upon the witness stand, to his intelligence or lack of intelligence,

831 to any bias or prejudice or feeling that may be manifested, and his relationship to any of the parties in the case, his interest in the outcome of the lawsuit, his means of knowledge of the facts about which he testifies, the reasonableness or unreasonableness of the story he tells. All of those things you will take into consideration in weighing the testimony, and you will give greater weight to that witness or those witnesses who, in your opinion, have more truthfully detailed the true facts of the case.

In that connection, you, the jury, will decide this case solely on the evidence in the case. You will not allow any sympathy for any of these parties to enter into your deci-

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sion. Neither will you allow any prejudice, if any, against any of the parties to this suit enter into your decision.

When you go to your jury room I suggest that you first select from your number a foreman, and after that is done start upon your deliberations and when you have reached a verdict return in open court and announce it.

I have prepared for your convenience in this case a jury form which you may use or not use, since it is prepared for your convenience. I suggest that you use it. At this time I will briefly explain the contents of it.

It has the style of the cases at the top together with the name of the court and the division of the court in 832 which the case is pending. Then it has a caption "Verdict Form," and in the first line the wording is this:

"In the named suit of the Trustees against Benedict Coal Corporation we find that plaintiff Trustees are entitled to recover as unpaid royalties the sum of \$76,504.71."

As heretofore indicated to you, the parties have agreed that the unpaid royalties amount to \$76,504.21.

In the second line it is stated:

"As against this sum we find that the defendant Benedict Coal Corporation is entitled to a set-off of \$81,017.68."

If you find the coal company sustained damages as a direct breach of the contract and you decide to award damages, you may insert the figure at the blank dollar mark in paragraph No. 2.

Paragraph 3 reads:

"In the cross-action of Benedict Coal Corporation against the defendant Unions"—there are just two unions, just one in fact, that is the international union of United Mine Workers of America and its District 28. The local union is not a party to the suit, neither are the members of the local union—"our verdict is for cross-plaintiff Benedict."

Then under that blank line I have written:

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“(Cross-plaintiff Benedict Coal Corporation, or cross-
833 defendants United Mine Workers and United Mine
Workers District 28.)”

You will write in that paragraph the party or parties in whose favor you render your verdict.

The fourth line reads, in parentheses:

“(If for the cross-plaintiff) Our verdict for the cross-plaintiff is for the sum of \$81,017.68.”

The cross-plaintiff is Benedict Coal Corporation. If you render a verdict in its favor on the cross-claim, then you will insert by the side of the blank dollar mark the amount of the award.

I have written a note on this form for clarification purposes. I covered the subject of the note in the charge.

“Note: If any part of the damage claimed by Benedict was caused solely by acts or actions of individual members of the local union, or the local union, such part or parts should not be charged to United Mine Workers or United Mine Workers District 28 in any award under the cross-action. However, as to the principal claim, such acts or actions of the individual members of the local union would be a defense.”

Now after you reach your verdict that verdict will be signed by your foreman, and as previously indicated you will return in open court and announce the verdict. But
834 now before you go to your room for your deliberations, I excuse you temporarily, but do not leave.

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: Does the original plaintiffs, the trustees, and cross-defendants, United Mine Workers of America, United Mine Workers of America District 28, have any exception or objection to this charge or any special requests?

Mr. Kramer: We do have, your Honor. Will you give us just a moment for conference.

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May it please the Court, the charge is lengthy and it is difficult to follow everything in there—

Mr. Winston: I can't hear you.

Mr. Kramer: I don't want to holler out. Some people complain because I talk too loud.

(A discussion was had off the record.)

Mr. Kramer: We desire to except to that portion of the charge wherein the Court instructed the jury, in substance, I believe upon two occasions, one being in the final summation with reference to the written charge and one earlier in the charge, that if individual members of the United Mine Workers of America or the Benedict local of the United Mine Workers of America, violated any of the contract provisions it could be considered by the jury as a violation of the contract and damages flowing therefrom, even from the individual acts of individual members of the local, could be off-set against the claim of the trustees.

Furthermore, to except to that portion of the charge also which permitted set-off at all against any claim by the trustees, and this goes across the board, whether there were acts claimed or proven by a preponderance of the evidence to have been committed by the international, District 28, the local or individual members. In other words, we think there is no right to set-off. This matter has been fully presented and I will not go into details of the motion.

We also desire to except to that portion of the charge wherein the Court submitted to the jury the question of whether or not the defendants to the cross-action, that is the international and District 28, are liable for breach of these wage agreements because of or as a result of any acts or conduct of either Scroggs or Clark or any other field agent or any officer of District 28.

It is our insistence, your Honor, that there is no substantial evidence in this record that any such field agent or District officer participated in, ratified or encouraged

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the calling or conducting of any of the strikes or work stoppages herein involved. And it is also our insistence in objecting to this portion of the charge that there is no evidence that any words, acts or conduct of any of
836 such field agents or District officers, which acts were done or words spoken with reference to any such strike or work stoppage, were authorized by, ratified by, or binding upon these cross-defendants or either of them.

Further, your Honor, we desire to except to that portion of the charge wherein the Court submitted to the jury the question of whether or not the strike or the work stoppage allegedly which occurred on May 18, 1953, was called or brought about for the purpose of requiring the Benedict Coal Corporation to cease doing business with the Big Mountain Coal Company, or was called or brought about for the purpose of forcing the employees of the Big Mountain Coal Company to become members of the United Mine Workers of America or the Benedict local.

With reference to this portion of the charge, it is our position, your Honor, that there is no evidence in this record of any desire or effort on the part of the cross-defendants, United Mine Workers of America and or District 28, to cause Benedict to cease doing business with the Big Mountain Coal Company, or any evidence of any effort on the part of these cross-defendants to force Big Mountain Coal Company employees to become members of the United Mine Workers of America or the said local.

It is further our position on this portion of the charge, your Honor, that there is no evidence in this record that any act with reference to such strike—I am referring to the May 18, 1953, strike or work stoppage—
837 was taken or had by any person or persons authorized to act in such matters for either of these cross-defendants.

Third, it is our position—this was the ground of the motion yesterday; may not be necessary—that the undisputed

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evidence shows Benedict Coal Corporation and the Big Mountain Coal Company are so inter-related from an economic standpoint and so allied with each other there is no reasonable basis for a finding that there was a secondary or neutral employer involved in the controversy.

Your Honor, we desire to further except to that portion of your Honor's charge dealing with the strike or work stoppage of February 8, 1952, and the strike or work stoppages of April 25th and 26th, 1952, that wherein your Honor submitted to the jury the question of whether or not these strikes and work stoppages were called or instituted for the purpose of requiring the Benedict Coal Corporation to cease doing business with M. M. Campbell or for the purpose of forcing the employees of M. M. Campbell to become members of the United Mine Workers of America, and I don't recall your Honor using the words "or in the local." I am going to put it in there—or the Benedict local.

Our basis for this objection is the same as to with reference to Big Mountain Coal Company, and I assume I need not repeat it to the Court.

838 The Court: No.

Mr. Kramer: We desire, may it please the Court, to except to that portion of your Honor's charge wherein the Court submitted to the jury for determination the question of whether or not the defendants, the international and District 28, or either of them, in connection with the strikes or work stoppages of April 14-17, 1950, September 27 through 29, 1950, January 10 and 11, 1951, July 30 and 31, 1951, October 1 through 8, 1951, the portion of February 7 and all of February 8, 1952, April 25th and 26th, 1952, August 5th and 6th, 1952, October 16 through October 27, 1952, May 18 through May 27, 1953, and the claimed strike or work stoppage of November 2nd and 7th and 8th—or half the 7th and 8th, 1951, violated any provision of

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the wage agreements in effect between the parties at the time of each such strike or claimed strike.

The basis of this objection, your Honor, is that there is no evidence in this record that the cross-defendants or either of them, or any agent thereof, acting within the scope of his authority, participated in, encouraged or ratified any of these such strikes.

Further, as to the work stoppage or strike of September 27-29, 1950, and the strike or work stoppage of October 16-27, 1952, the water stoppage and the Wage Stabilization stoppages, it is our position that neither of these is, under any proper construction of the contract, within the scope of the contemplation of the wage agreements that were in effect at the time that these occurred, and that therefore even if there should be in this record proof that they or either of them was authorized, ratified or encouraged or suggested by either of the cross-defendants nevertheless such act would not constitute a breach of the contract and was not within the contemplated scope thereof.

We further desire to object to the portion of the charge dealing with the May 18 through May 27, 1953, work stoppage for the reason that the uncontradicted proof shows that the men offered to return to work on either May 19th or May 20th, and therefore even if such strike were authorized, encouraged or ratified or in any way participated in its origin by the District or the international, that any damages flowing therefrom must terminate as of May 19th or 20th when the men offered to go to work and should damages be allowed for that on the cross action it should be limited to such as were proven in this record for the two- or three-day period.

There is a dispute whether that was May 19th or May 20th they offered to go back.

And it is further our insistence, and we do now request the charge, that insofar as any right to off-set on the orig-

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840 inal suit is concerned damages found to be occurred by reason of any acts even of individuals of the local, under the theory of the original action submitted, the amount of damages that could be off-set or charged in the original action, should be limited to the period of May 18th through May 20th.

It is our position, your Honor—I want to state it and get a general exception—that the no-strike—generally called the “no-strike” provision of the contracts, had been removed prior to the period here involved, and that it is not a violation of either one of the agreements in effect during this period for the men to strike during the period grievances are being considered or going through this procedure.

To make it clear, your Honor, we say that under this record there were grievances, the men discussed these differences in many of these instances with the management and that they did not get any satisfaction, did not get them settled. The water, for instance; the vacation pay, for instance; the cut-off of credit—in those particular instances, and perhaps others, there had been discussions in compliance with the grievance procedure between the men involved and management, and that if after this original taking up of the grievance the strike or work stoppage occurred it was not a violation and if it was settled during the period by negotiations that there would not be
841 any violation of the contract.

The Court: All right. Any other objection, Mr. Kramer.

Mr. Kramer: No, your Honor, that covers ours.

The Court: Mr. Winston or Mr. Milligan, does the Benedict Coal Corporation have any objection or exception to this charge?

Mr. Winston: Your Honor, Benedict Coal Corporation notes the following exceptions:

Proceedings

First, that the Court failed to charge that if you find that these strikes or breaches of contract were a material breach of the contract then the defendant trustees would be entitled to recover nothing from Benedict.

Second, the Court charged the jury that as to the principal claim the evidences as to the encouragement of the strike by the District officials are material only as further justification or of Benedict's defense, or words to that effect.

Our position is that we have two defenses the jury might consider. First, breaches of contract and law violations by the employees that were employed at Benedict; second, breaches of the same contract and boycott law violations by the District and international. The second defense of course is dependent upon ratification or encouragement, and so forth.

842 The second defense should also be considered because District 28 and the international union were contracting parties, and as we understand it any defense which you could assert against a contracting party can also be asserted against a beneficiary.

Third, we would like to save our exception to the charge because of the failure of the Court to charge and to permit recovery for punitive damages as alleged in our pleadings.

The Court: Any other exceptions?

Mr. Winston: That is all, thank you.

Mr. Kramer: Both of us have stated in general terms requested charges. Technically, we do comply with the rule. If your Honor would require us to write them out to—

The Court: I don't understand any requests. What requests do you—these papers you gave to me?

Mr. Kramer: I am talking about just now, what we have stated in the last few minutes.

The Court: Save exception to, yes.

Proceedings

Mr. Kramer: And the only thing we had was a request with reference to this last strike that your Honor charged them, that there could be no recovery after the May 20th or 19th period, and we were asking—

The Court: You say that I should tell the jury.

843 Mr. Kramer: That's right.

The Court: I understand.

Mr. Kramer: And I say it is not necessary for us to write that out?

The Court: No.

Mr. Kramer: Counsel did the same as to punitive damages, and we are not writing them out formally.

The Court: You are excepting to my charge because I charged a certain way or because I failed to charge a certain way.

Mr. Kramer: That's right.

The Court: Call the jury back.

(Whereupon, the following proceedings were had in the presence of the jury:)

The Court: Mrs. Stansberry and gentlemen of the jury, we are going to adjourn for lunch.

(Whereupon, at 12:10 p. m. court recessed for the noon hour.)

844

Afternoon Session.

(Whereupon, at 1:12 p. m. Court reconvened and the following proceedings were had in the presence of the jury, to-wit:)

The Court: Gentlemen, do you waive the call of the jury in the Trustees' case?

Mr. Winston: We do, your Honor.

Mr. Kramer: Yes, your Honor.

The Court: The two alternate jurors may step aside but you are not excused, and the regular jury may now retire for the consideration of their verdict, Mr. Marshal.

Proceedings

(Whereupon, the jury retired to consider of its verdict, and thereafter reported into open Court and the following proceedings were had in the presence of the jury, to-wit:)

The Court: Gentlemen, do you waive the call of this jury?

Mr. Kramer: Yes, your Honor.

Mr. Winston: We do, your Honor.

The Court: Mr. Foreman, have you agreed on the verdict?

The Foreman: No, sir, we have not. The one juror—

The Court: Wait, Mr. Foreman. Let's not say about one juror. You have not agreed yet, as I understand?

845 The Foreman: No, sir.

The Court: Is there any juror that wants to ask a question of law to the Court; any confusion or uncertainty about any question of law involved? The Court may be able to help you on the law, but it cannot help you on the facts. The Court cannot discuss the facts with you but it can discuss the law.

The Foreman: Well, your Honor, is it proper that one juror to speak for himself or herself?

The Court: I will hear any juror who wants to be heard.

A Juror: Your Honor, there is a question in view of the complexity of this case and the facts involved, and as part of the evidence and testimony given in it there were certain exhibits that were presented as part of the evidence.

We, as a jury, would like to make a request of the Court, permission of the Court, if those exhibits be made available to us in making our decision.

The Court: Will counsel come to the Bar?

(A discussion was had at the Bar between counsel and the Court.)

Proceedings

The Court: Now is the Court correct in the understanding of the juror, that the jury wants all the exhibits that were filed in the record?

846 A Juror: Not of the necessity, sir; however, we felt it would be proper to ask for them all, sir.

The Court: All right. With the consent of counsel for all the parties, I will ask the Clerk to bring them into the Court and turn them over to the jury.

A Juror: One more question, sir.

The Court: All right.

A Juror: With the permission of the Court, and if it is in order, can we have access to the charge of the Court as to the law?

(A discussion was had at the Bar between counsel and the Court.)

The Court: Mr. Juror, under the law the Court does not have authority to turn over to the jury his charge. Now if there is any particular point of law that you want the Court to charge on again, the Court will be glad to do so. But under the law, as indicated, the Court just does not have authority to turn over the charge.

Moreover, the charge the Court used, the Court used a manuscript in his charge as well as notes made by the Court throughout the trial which were reduced to typewriting by the Court's secretary. Now that is the situation.

A Juror: I understand, Your Honor. Thank you
847 very much.

The Court: And moreover, I have interlined in the typewritten charge in so many places that the jury might have difficulty in following the interlineations, but if the jury wants me to charge on any part of the law again I am in a position to do so.

A Juror: Thank you.

The Court: Is there any other question that you want to ask?

Proceedings

A Juror: Your Honor, there is one thing that might speed us along, there may be a little misunderstanding, I don't know. I think it would be entitled to take the exact amount that the union people are claiming as royalties due, can we have that?

The Court: Yes, sir. \$76,504.21 unpaid royalty.

A Juror: We were off a little on that.

The Court: Is there any other question?

A Juror: Are these other total figures on the chart given us, are we to use those as being correct?

The Court: Those are matters of fact that the Court cannot comment on. Those are matters over which the jury have exclusive control.

A Juror: There has been some erasing done. I wonder if that effected the totals?

The Court: You mean——

848 A Juror: That was in the court room that it was done. .

The Court: Well, I think those charts will show that the erasures were done with agreement of all parties, and the jury will have to decide what the witnesses said about the erasures at the time they were made.

Any other questions?

A Juror: That particular chart in this evidence, this exhibit——

The Court: Yes, all the exhibits are there. Give them to the Foreman.

The Foreman: Thank you.

The Court: Any other questions? All right.

(Whereupon, the jury retired to consider of its verdict, and thereafter reported into open Court and the following proceedings were had in the presence of the jury; to-wit:)

The Court: Gentlemen, do you waive the call of this jury?

Mr. Winston: We do, your Honor.

Proceedings.

Mr. Kramer: Yes, your Honor.

The Court: Lady and gentlemen of the jury, have you agreed upon your verdict?

The Foreman: Yes, sir.

The Court: Will you tell us the verdict?

849 The Foreman: The Benedict Coal Corporation to pay the United Mine Workers the sum of \$76,504.21, and that the United Mine Workers pay the Benedict Coal Corporation \$81,017.68. The amount that is claimed in each case.

The Court: Now then you permit on offset of the \$81,017.68 against the \$76,504.21 for unpaid dues, is that right?

The Foreman: Well, your Honor, I did not insert that because of a technicality in bookkeeping. We would offset more than was due. In other words, if we had, we couldn't offset \$81,017.68 against \$76,504.21, because it would be more, but the equivalent amount could be offset and there would be a balance.

The Court: Of a little over \$4,000.

The Foreman: \$4,513.47.

The Court: Well, now, was that your purpose in your verdict?

The Foreman: Our purpose—our purpose was to arrive at the two figures as was presented to the jury.

The Court: You say that there is seventy-six thousand-plus unpaid of royalties?

The Foreman: Yes, sir.

The Court: And you say further that the Benedict was damaged in round figures of eighty-one thousand, whatever it is?

850 The Foreman: Yes, your Honor.

The Court: All right. Do you say that was caused, that damage was caused by whom? What do you say about the Mine Workers and its District 28?

Proceedings

The Foreman: That this was by a breach of contract.

The Court: By the United Mine Workers and District 28?

The Foreman: Yes, sir, your Honor.

The Court: What do you say as to the local union there under the first question in the verdict form?

The Foreman: Your Honor, the local union is not mentioned in this.

The Court: No, it is not a party to the suit. Well, is the effect of your verdict an offset against the unpaid royalties on the claim of the three Trustees against the Benedict?

The Foreman: Well, a portion of it could be so applied; yes, sir.

The Court: Is that the intention of the jury?

The Foreman: Well, your Honor, we thought that was a matter of bookkeeping and we did not think it quite within the purview of the jury to adjudicate a settlement as to how it was made.

The Court: You think that is a Court question?

The Foreman: Yes, sir, that part as to how the
851 settlement is made.

The Court: Let me see the verdict form.

Under No. 1 of the verdict form: "In the suit of the Trustees against the Benedict Coal Corporation, we find that plaintiff Trustees are entitled to recover as unpaid royalties a sum of \$76,504.21. As against this sum we find that the defendant, Benedict Coal Corporation, is entitled to a set-off of blank dollars."

You have not filled that in.

The Foreman: No, sir.

The Court: I am going to ask the jury to go back and fill that.

No. 3. "In the cross-action of the Benedict Coal Corporation against the defendant unions, our verdict is for the cross-plaintiff, Benedict Coal Corporation.

Proceedings

"No. 4. If for cross-plaintiff, our verdict for the cross-plaintiff is for the sum of \$81,017.68."

I think that you should fill in the No. 2 there. I think you should retire, Mr. Foreman.

The Foreman: Well, your Honor, may I ask a question? We felt there would not be a set-off of more than the amount as specified here, that if we set off an amount there it should equal, be equivalent.

The Court: As a matter of law you can, it can be more as a matter of law, whatever the jury decides.

852 The Foreman: Then we can set off the amount specified.

The Court: Yes, if the jury agrees on that.

The Foreman: That will not be affecting the balance of \$4,513.47; no.

The Court: No.

(Whereupon, the jury retired to consider its verdict, and the following proceedings were had in the absence of the jury, to-wit:)

Mr. Kramer: May it please the Court, in view of the type of verdict that the jury has brought in, we ask your Honor to request the jury to find on the cross-action what amount, if any, of the \$81,017.68 is attributable to acts of the local union or the individual members of the local union.

The Court: Well, gentlemen, we have gone over that with the jury. I am not going to go into those matters. We have been over it during the five days.

(Whereupon, the jury reported into open Court and the following proceedings were had in the presence of the jury, to-wit:)

The Court: Gentlemen, do you waive the call of this jury?

Mr. Winston: Yes, your Honor.

Mr. Kramer: We do, your Honor.

Proceedings

853 The Court: Mr. Foreman, have you agreed upon a verdict?

The Foreman: We have.

The Court: Will you read it to the Court.

The Foreman: The Benedict Coal Corporation is to pay the Trustees of the United Mine Workers in the amount of \$76,504.21. The United Mine Workers is to pay the Benedict Coal Corporation \$81,017.68.

The Court: All right. What do you hold on the set-off?

The Foreman: Well, the amount that we listed, and the only amount we knew to list, was the amount of the verdict, \$81,017.68.

The Court: Do you have the verdict there signed?

The Foreman: Yes, sir.

The Court: Now, as I read this I will ask you on each one.

Under the first heading: In the named suit of the Trustees against the Benedict Coal Corporation we find plaintiff Trustees are entitled to recover as unpaid royalties the sum of \$76,504.21.

So say you all, that is your verdict?

(The jury indicated in the affirmative.)

The Court: Second: As against this sum we find the defendant, Benedict Coal Corporation, is entitled to
854 a set-off of \$81,017.68.

So say you all, that is your verdict on that point?

(The jury indicated in the affirmative.)

A Juror: A question there, we were of the opinion that the Benedict Coal Corporation should receive a difference of about \$4,000.

The Court: Well, that will be a matter of law.

A Juror: I agree on that.

The Court: That will be a matter of law.

Third: In the cross-action of Benedict against the de-

Certificate

defendant union, our verdict is for cross-plaintiff, Benedict Coal Corporation.

So say you all, that is your verdict on that point? (The jury indicated in the affirmative.)

The Court: Fourth: Our verdict for the cross-plaintiff is for the sum of \$81,017.68.

So say you all, that is the verdict on that point? (The jury indicated in the affirmative.)

The Court: Gentlemen, is there anything further before I release this jury until Monday morning? The jury is released until Monday morning at 9:00 o'clock.

(Whereupon, these proceedings were adjourned.)

855

Certificate.

I, Stanley K. Ford, Official Reporter of the United States District Court for the Eastern District of Tennessee, Northeastern Division, do certify that the foregoing transcript is a true, full and correct transcript of all the evidence introduced and heard in the trial of the foregoing cause No. 944 Civil, John L. Lewis, Charles A. Owen, Josephine Roche, Trustees, or the United Mine Workers Welfare and Retirement Fund, plaintiffs, v. The Benedict Coal Corporation, defendant-cross plaintiffs, v. United Mine Workers of America, and United Mine Workers of America, District No. 28, cross-defendants, when it was tried in the United States District Court for the Eastern District of Tennessee, at Greeneville, on March 19-23, 1956, before the Honorable Robert L. Taylor, Judge of said Court.

In Testimony Whereof, witness my hand this 4th day of June, 1956.

STANLEY K. FORD,

Official Reporter.

[fol. 753]

**IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**Supplemental Appendix to Brief of Appellants—
Filed May 10, 1957**

No. 13,055

[fol. 754]

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1947

Effective July 1, 1947, to June 30, 1948
Executed at Washington, D. C., July 8, 1947

**UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND**

"A. It is hereby stipulated and agreed by the contracting parties hereto that there is hereby created a Fund to be designated and known as the 'United Mine Workers of America Welfare and Retirement Fund.' During the life of this Agreement, there shall be paid into such Fund by each Operator signatory hereto the sum of ten cents (10¢) per ton of two thousand (2,000) pounds on each ton of coal produced for use or for sale. Such Fund shall have its place of business in Washington, District of Columbia, and it shall be operated by a Board of Trustees, one of whom shall be appointed as a representative of the Employers, one of whom shall be appointed as a representative of the United Mine Workers of America, and one of whom shall be a neutral party selected by the other two. In the event of resignation, death, inability or unwillingness to serve of the Trustee appointed by the Operators or the Trustee appointed by the United Mine Workers of America, the Operators shall appoint the successor of the Trustee originally appointed by them and the United Mine Workers of America shall appoint the successor of the Trustee originally appointed by it.

The Operators signatory hereto do hereby appoint Ezra Van Horn of Cleveland, Ohio, as their representative on

said Board of Trustees. The United Mine Workers of America do hereby appoint John L. Lewis of Washington, D. C., as its representative on said Board of Trustees. It is further stipulated and agreed by the joint contracting parties that the aforesaid two Trustees shall with all dispatch designate and name a third and neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Fund herein created.

[fol. 755] In the event of a deadlock on the designation or agreement as to the neutral Trustee, or any future neutral Trustee, an impartial umpire shall be selected either by agreement of the two Trustees, representatives of the contracting parties hereto, or by petition by either of the contracting parties hereto to the United States District Court for the District of Columbia for the appointment of such an impartial umpire, all as made and provided in section 302 (c) of the 'Labor-Management Relations Act, 1947.'

It is agreed by the contracting parties hereto that the Trustees herein provided for shall serve for the duration of this contract and as long thereafter as the proper continuation and administration of said trust shall require.

It is agreed that this Fund is an irrevocable trust created pursuant to Section 302(c) of the 'Labor-Management Relations Act, 1947,' and shall endure as long as the purposes for its creation shall exist. Said purposes shall be to make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise compensated for at all or adequately by tax supported agencies created by federal or state law; (3) benefits on account of sickness, temporary disability, permanent disability death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302 (c) of the 'Labor-Management Relations Act, 1947,'

as agreed upon from time to time by the Trustees, including the making of any or all of the foregoing benefits applicable to the individual members of the United Mine Workers of America and their dependents; and (5) benefits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the aforesaid 'Labor-Management Relations Act, 1947.' Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the 'Labor-Management Relations Act, 1947,' and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

The aforesaid Trustees shall designate a portion (which may be changed from time to time) of the payments herein provided, based upon proper actuarial computations, as a separate fund to be administered by the said Trustees herein described and to be used for providing for pensions or annuities for the members of the United Mine Workers of America or their families or dependents and such other persons as may be properly included as beneficiaries thereunder.

It is further agreed that the detailed basis upon which payments from the Fund will be made shall be resolved in writing by the aforesaid Trustees at their initial meeting, or at the earliest practicable date that may by them thereafter be agreed upon.

Title to all the moneys paid into said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust and that no benefits or moneys payable from this Fund shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void. The moneys to be paid into said Fund shall not constitute or be deemed wages due to the individual mine worker, nor shall said moneys in any manner be liable for or subject

to the debts, contracts, liabilities or torts of the parties entitled to such money, i.e., the beneficiaries of said Trust under the terms of this Agreement.

The obligation to make payments to the 'United Mine Workers of America Welfare and Retirement Fund' under this contract shall become effective on July 1, 1947, and the first actual payments are to be made on August 20, 1947, and thereafter continuously on the 20th day of each succeeding calendar month covering the production of all coal for use or sale during the preceding months.

[fol. 757] It is stipulated and agreed by the contracting parties hereto that the Trustee designated by the United Mine Workers of America shall be the Chairman of the Trustees of the Fund provided for in this Agreement.

It shall be the duty of the Operators signatory hereto, and each of them, to keep said payments due said Fund, as hereinabove described and provided for, current and to furnish to the United Mine Workers of America and to the Trustees hereinabove designated a monthly statement showing the full amount due hereunder for all coal produced for use or for sale from each of the several individual mines owned or operated by the said Operators signatory hereto. Payments to said Fund shall be made by check payable to 'United Mine Workers of America Welfare and Retirement Fund' and shall be delivered or mailed to the office of said Fund located at 907 Fifteenth Street, N. W., Washington, D. C., or as otherwise designated by the Trustees.

It is stipulated and agreed by the contracting parties hereto that an annual audit of the Fund hereinabove described shall be made by competent authorities to be designated by the Trustees of said Fund. A statement of the results of such audit shall be made available for inspection of interested persons at the principal office of the Trust Fund and at such other places as may be designated by the Trustees.

Failure of any Operator signatory hereto to make full and prompt payments to the 'United Mine Workers of America Welfare and Retirement Fund' in the manner and on the dates herein provided shall, at the option of the United Mine Workers of America, be deemed a violation of

this Agreement. This obligation of each Operator signatory hereto, which is several and not joint, to so pay such sums shall be a direct and continuing obligation of said Operator during the life of this Agreement and it shall be deemed a violation of this Agreement if any mine to which this Agreement is applicable shall be sold, leased, subleased, assigned, or otherwise disposed of for the purpose of avoiding the obligation hereunder.

Action which may be required hereunder by the Operators for the appointment of a successor Trustee representing them, or which may be required in connection with [fol. 758] any other matter hereunder, may be taken by those Operators who at the time are parties hereto, and authorization, approval, or ratification of Operators representing fifty-one percent (51%) or more of the coal produced for use or sale during the calendar year previous to that in which the action is taken shall be sufficient and shall bind all Operators.

B. It is hereby stipulated and agreed by the contracting parties with respect to the Fund created by Section 4(a) of the National Bituminous Coal Wage Agreement dated May 29, 1946 (commonly known as the Krug-Lewis Agreement), as follows:

(1) The Operators signatory hereto agree to make payments into said Fund on or before July 15, 1947, on account of all coal produced for use or sale up to and including June 30, 1947, with respect to which payment has not heretofore been made, such payments to be on the basis heretofore made by said Operators under the provisions of the Krug-Lewis Agreement.

(2) The Operators signatory hereto hereby renounce and forever release any and all claim to or interest in payments made into said Fund.

(3) The Trustees appointed pursuant to this Agreement are hereby authorized and directed to accept into the new trust fund hereby created and to devote for the purposes hereinabove specified and enumerated, any and all trust funds remaining unexpended or un-

obligated in said trust fund so created by Section 4(a) of the Krug-Lewis Agreement.

(4) The parties hereto agree that the best interest of the beneficiaries of said trust fund would be served by having all unexpended or unobligated funds therein transferred as above provided, and agree that the Trustees thereof should transfer such funds to the new trust fund created by this Agreement.

C. It is stipulated and agreed by and between the contracting parties that the moneys collected under Section 10 of the Krug-Lewis Agreement for the benefit of the Fund designated as 'Medical and Hospital Fund' as provided for in Section 4(b) of said Krug-Lewis Agreement shall be [fol. 759] transferred to the Trustees of the 'United Mine Workers of America Welfare and Retirement Fund' as established by this Agreement and said moneys shall be coordinated into the aforesaid Fund and be made subject to the stated purposes hereinabove set out.

It is stipulated, understood and agreed by the contracting parties hereto that present practices with respect to wage deductions and their use for provision of medical, hospital and related services shall continue during the term of this contract or until such earlier date or dates as may be agreed upon by the United Mine Workers of America and any Operator signatory hereto.

D. It is the intent and purpose of the contracting parties hereto that full cooperation shall by each of them be given to each other, the Trustees named under this Section and to all affected Mine Workers to the eventual coordination and development of policies and working agreements necessary or advisable for the effective operation of this Fund."

[fol. 760]

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**Supplemental Appendix to Brief of Appellants—
Filed May 14, 1957**

No. 13,056

[fol. 761]

CONSTITUTION OF THE INTERNATIONAL UNION

UNITED MINE WORKERS OF AMERICA

Effective November 1, 1948

(Exhibit 17, Appendix 385a)

ARTICLE XVI.

STRIKES.

Section 1. No District shall be permitted to engage in a strike involving all or a major portion of its members, without the sanction of an International Convention or the International Executive Board.

Sec. 2. Districts may order local strikes within their respective Districts on their own responsibility, but where local strikes are to be financed by the International Union, they must be sanctioned by the International Executive Board.

CONSTITUTION OF THE INTERNATIONAL UNION

UNITED MINE WORKERS OF AMERICA

Effective November 1, 1952

(Exhibit 17, Appendix 385a)

ARTICLE XVI.

STRIKES.

Section 1. No District shall be permitted to engage in a strike involving all or a major portion of its members,

without the sanction of an International Convention or the International Executive Board.

Sec. 2. Districts may order local strikes within their respective Districts on their own responsibility, but where local strikes are to be financed by the International Union, they must be sanctioned by the International Executive Board.

[fol. 762]

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
October 15, 1957

(omitted in printing)

[fol. 763]

IN UNITED STATES COURT OF APPEALS

JUDGMENT—Filed September 26, 1958

No. 13,055

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby set aside for amendment by the District Court in accordance with the views expressed in the opinion.

[fol. 764]

IN UNITED STATES COURT OF APPEALS

JUDGMENT—Filed September 26, 1958

No. 13,056

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby set aside and the case is remanded solely for a redetermination in accordance with the views expressed in the opinion, of the amount of damages Benedict Coal Corporation is entitled to recover from United Mine Workers of America and United Mine Workers of America, District 28.

[fol. 765]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 13,055 and 13,056

JOHN L. LEWIS, CHARLES A. OWEN and JOSEPHINE ROCHE,
as Trustees of the United Mine Workers of America
Welfare and Retirement Fund, Appellants,

v.

BENEDICT COAL CORPORATION, Appellee.

UNITED MINE WORKERS OF AMERICA, and UNITED MINE
WORKERS OF AMERICA, DISTRICT 28, Appellants,

v.

BENEDICT COAL CORPORATION, Appellee.

Appeal from the United States District Court for the Eastern District of Tennessee, Northeastern Division.

OPINION—Decided September 26, 1958 .

Before SIMONS, Chief Judge, MILLER and STEWART, Circuit Judges.

STEWART, Circuit Judge. The parties to these consolidated appeals are John L. Lewis, Charles A. Owen, and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund; Benedict Coal Corporation; United Mine Workers of America; and United Mine Workers of America, District 28. For economy the parties will be referred to, respectively, as the [fol. 766] Trustees, Benedict, the International Union, and District 28 (and the latter two collectively as the Unions). The United Mine Workers of America Welfare and Retirement Fund will be referred to as the Fund.

This action originated when the Trustees sued Benedict, a coal mine operator, to recover royalties allegedly due the Fund under the National Bituminous Coal Wage Agreement of 1950 and the amendment to said agreement of 1952, with respect to coal mined by Benedict from March, 1950, to July, 1953. The agreements in question were negotiated between the International Union and an employer association representing Benedict and other employers. Under the agreements Benedict was obligated to pay the Fund thirty cents for each ton of coal it produced during part of the period involved and forty cents for each ton it produced during the remainder of the period. Cf. *Lewis v. Quality Coal Corporation*, 243 F. (2d) 769 (7 Cir., 1957). Although Benedict did make some payments to the Fund for coal mined during the period in question, it was stipulated before trial that additional coal had been mined by Benedict upon which royalties in the amount of \$76,504.26 had not been paid.

Benedict's answer to the complaint denied liability upon the ground that the Trustees were beneficiaries of the 1950-52 agreement between Benedict and the International Union, that therefore any defenses, counterclaims, or set-offs which Benedict had against the International Union were available against the Trustees, and that the International Union had breached the agreements by causing a series of strikes, all of which were in violation of the

agreements and two of which were also in violation of the Labor Management Relations Act of 1947, damaging Benedict in excess of the amount sought by the Trustees. Benedict also defended upon the ground that even if the International Union had not been responsible for the strikes, the misconduct of Benedict's individual employees constituted a defense to the Trustees' action, because these employees were beneficiaries of the Trust.

In addition to its answer filed in response to the Trustees' complaint,¹ Benedict filed a cross-claim against the Unions, claiming damages resulting from the series of [fol. 767] strikes between April, 1950, and May, 1953, allegedly caused or ratified by the Unions in violation of the aforesaid agreements and, in the case of two of these strikes, also allegedly in violation of the secondary boycott provisions of the Labor Management Relations Act of 1947. The cross-defendant Unions denied any violation on their part of either the agreements or the federal statute.

After a lengthy trial the issues were submitted to a jury, upon instructions that damages to Benedict caused by wrongful acts of its employees would constitute a defense to the Trustees' action, but that Benedict could recover on the cross-claim only upon a finding that wrongful acts of the individual employees had been caused or ratified by the Unions. The jury returned a verdict finding that the Trustees were entitled to recover unpaid royalties in the stipulated amount of \$76,504.26, and that Benedict was entitled to a set-off against this amount of \$81,017.68, the amount in which the jury found in the cross-claim that Benedict had been damaged by the Unions. In accordance with his interpretation of the jury's verdict the district judge entered judgment for Benedict against the Unions for \$81,017.68 and granted execution of the same. He further entered judgment in favor of the Trustees against Benedict in the amount of \$76,504.26, but instead of ordering execution upon this judgment, provided that it should be paid, under the administration of the court, from the

¹ Benedict also filed a counterclaim against the Trustees for the recovery of royalties it had actually paid during the period involved. The counterclaim was denied by the district court in a summary judgment, from which Benedict has not appealed.

proceeds of Benedict's judgment against the Unions.² From this judgment the Trustees have appealed, as have the Unions.

The issues presented by the appeals of the Unions will be dealt with first, since their determination affects the disposition of the Trustees' appeal. The many errors claimed by the Unions relate to three basic issues: (1) Did [fol. 768] any or all of the strikes in question violate the agreement of 1950-52 or the Labor Management Relations Act if they were caused by the Unions? (2) If so, was there sufficient evidence to support a finding that either District 28 or the International Union was responsible for any or all of the strikes? (3) If so, were the damages assessed against the Unions excessive?

At the outset the Unions deny liability for damages resulting from the strikes on the ground that the right to strike was preserved in the 1950-52 agreement. It is true that the agreement expressly stated that the "no strike" provisions of the previous contracts were superseded.³ However, the agreement provided in detail the procedure to be followed for the settlement of localized disputes or

² "In accordance with the Court's interpretation of the offset provision in the jury's verdict and as a means of carrying out the intended effect of the verdict, it is ordered that the Benedict Coal Corporation have and recover the sum of \$81,017.68 from United Mine Workers of America and United Mine Workers of America District 28, for which execution may issue.

"It is further ordered that said sum of \$81,017.68 be paid into the registry of the Court to be disbursed by the clerk in accordance with instructions appearing below.

"It is further ordered that said Trustees, in accordance with the verdict rendered in their favor, have and recover of Benedict Coal Corporation the sum of \$76,504.26, said recovery to be had in the manner following: From the aforesaid \$81,017.68 ordered paid into the registry of the Court, that the sum of \$76,504.26 be paid to said Trustees. That the difference between \$76,504.26 and \$81,017.68 be paid to Benedict Coal Corporation."

³ "1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any 'no strike' or 'Penalty' clause or clauses or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void."

grievances.⁴ This procedure was also made exclusive and obligatory by the following provisions:

"3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspension of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the 'Settlement of Local and District Dis- [fol. 769] trict Disputes' section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry.

"4. The United Mine Workers of America and the Operators signatory hereto affirm their intention to

⁴ *"Settlement of Local and District Disputes."*

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

"1. Between the aggrieved party and the mine management.

"2. Through the management of the mine and the Mine Committee.

"3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

"4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

"5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement."

These sections were revised in the 1952 amendment, but the obligation to resort to the specified procedure was not substantially changed.⁵

Determination of this preliminary issue thus depends upon what effect the agreement to settle all local disputes in accordance with the "Settlement of Local and District Disputes" procedure had upon the right to strike which was expressly preserved in the 1950-52 agreement. The question is not without precedent. The same basic issue was thoroughly considered in *United Constr. Workers v. Haislip Baking Co.*, 223 F. (2d) 873 (4 Cir., 1955); *W. L. Mead, Inc. v. Int'l. Brotherhood of Teamsters*, 126 F. Supp. 466, aff'd. 230 F. (2d) 576 (1 Cir., 1956); and *International Union, United Mine Workers of America v. National Labor Relations Board*, . . . F. (2d) . . . (D. C. Cir., June 12, 1958). With all respect for the majority view expressed in the latter decision, we agree with the dissenting judge in that case, and with the decisions in the *Haislip* and *Mead* cases, that a strike to settle a dispute which a collective bargaining agreement provides shall be settled by an exclusive and obligatory alternative procedure constitutes a violation of the agreement.

This conclusion does not make meaningless the express abrogation of a no strike clause in the 1950-52 agreement. The right to strike was preserved with respect to all dis-

⁵ "3. The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts."

putes not subject to settlement by other methods made exclusive by the agreement. Moreover, the Unions remained [fol. 770] free from liability for spontaneous or "wildcat" strikes. Such spontaneous strikes would be the kind of "stoppages" and "suspensions of work" which the agreement made subject to the settlement procedure therein provided.

Viewing the eleven work stoppages in question by these standards, and without stating the facts in detail, we conclude that the evidence was insufficient to show that the stoppage of September, 1950, the "Water Strike," and the stoppage of January 10-11, 1951, the "Collingsworth Strike," were concerted strikes resulting from a labor dispute. These were clearly spontaneous work stoppages, and consequently, they did not constitute violations of the 1950-52 agreement. As to the remaining strikes, we conclude that, except for the "Wage Stabilization Strike" of October, 1952, the evidence was sufficient to support the jury's determination that they resulted from localized labor disputes which were cognizable under the settlement procedure provided by the agreement.* The October, 1952, strike resulted from the refusal of the operators to pay negotiated wage increases in the absence of approval by the Wage Stabilization Board. Being national in scope, this dispute was not under the agreement subject to settlement on the local or district level.

The second basic contention of the International Union and District 28 is that even if the agreement prohibited strikes with respect to local disputes, the strikes in question were not authorized or ratified by the International Union or District 28. It is clear from the record that the district judge was not in error in instructing the jury that District 28 and its agents were agents of the International Union with respect to the activities involved here. The real issue is whether the District's agent did induce the

* This being so, it is unnecessary to consider whether two of these strikes also violated the Labor Management Relations Act of 1947.

strikes in question. The evidence on this issue was sparse and conflicting, but was sufficient to sustain the jury's finding. Scott, a former employee of Benedict and a member of the local mine committee, testified that prior to the first strike and several times thereafter he was told by Scroggs, a field representative of District 28, "I can't tell you boys when to strike. I can't tell you to strike, but when I tell you when you don't get what you want why you boys know what to do. Scott was then permitted to testify as to his understanding of Scroggs' statement. Scroggs [fol. 771] unequivocally denied having made this statement. By their finding the jury chose to believe Scott rather than Scroggs. This was their prerogative.

The jury were properly instructed that the Unions were responsible for the acts of their representatives only if the latter were engaged within the scope of their employment or authority, but that actual authorization of specific acts was unnecessary. 29 U. S. C. A., § 185 (e). Moreover, the fact, if it is so, that field representatives of the District lacked actual authority to call strikes is not controlling. These representatives were sent by the District to attempt to settle local disputes at the Benedict mine. The declarations attributed to Scroggs all took place while he was on these missions. The calling of a strike was clearly one way to "settle" a labor dispute, although a way not permitted by the agreement. Consequently the jury were amply justified in finding that Scroggs was acting within the scope of his employment when he made the declarations in question. Compare, *United Mine Workers v. Patton*, 211 F. (2d) 742 (4 Cir., 1954), with *Garmcada Coal Co. v. International Union*, 122 F. Supp. 512 (E. D. Ky., 1954), *aff'd*, 230 F. (2d) 945 (6 Cir., 1956).

Finally, the Unions contend that even if liability for the strikes is imputable to them, the finding of damages in the amount of \$81,017.68 was excessive and not supported by the evidence. For the reasons which follow we agree with this contention. Since the total verdict for Benedict was in the exact amount demanded in its cross-claim, the jury must have accepted each item of damage and at-

tributed to it the respective amount claimed by Benedict.⁷ Included in the items of loss claimed was \$21,534.85, representing the amount expended on a construction project which was abandoned after construction was interrupted by strikes in February and April, 1952. We agree with the appellants that the district court erred in permitting the jury to consider this item as part of Benedict's damages. [fol. 772] Benedict received materials and services for the entire \$21,534.85. If Benedict subsequently decided to abandon the project and to write off the amount spent, it is difficult to see how the Unions thereupon became liable for the loss. Clearly this loss, if it be treated as such, is an item of special damages which could not have been within the contemplation of the parties to the contract. Compare *United Constr. Workers v. Haislip Baking Co.*, *supra*, at 875-76.

We reach a similar conclusion with regard to the loss in the amount of \$6,000 representing the replacement cost of a cable which had been purchased for use in the same construction project. After abandonment of the project the cable was left on the ground and about six months later was destroyed by a forest fire. Benedict's witness testified that the cable was not removed because it was anticipated that the construction would be resumed. Thus the loss of the cable was the direct result of Benedict's own decision, rather than the appellants' breach of contract. Moreover, the loss is so indirectly related to the strikes that it was clearly beyond the contemplation of the parties to the agreement.

The damages alleged by Benedict consisted of the following items:

(1) An increase in the cost of production of coal mined during each of the eleven months in which strikes occurred, aggregating	\$49,850.33
(2) Loss resulting from the abandonment of a construction project	21,534.85
(3) Loss resulting from the destruction of a cable by forest fire	6,000.00
(4) Loss of income incurred because of inability to process coal for other producers during the strikes	3,632.50
Total	\$81,017.68

In addition, we agree with the Unions' contention that the formula used by Benedict to calculate the amount of loss attributable to each strike, and apparently accepted by the jury, was clearly erroneous. The formula as it appears from the exhibits and testimony involved a determination of the amount by which the cost of coal produced during months in which strikes occurred was increased because of the curtailment of production and a resulting higher ratio of fixed costs to tons of coal produced. The increase in fixed costs per ton was multiplied by the number of tons which would have been produced during the month if no interruption had occurred, and the resulting amount was claimed as the loss sustained because of the strike. This formula was erroneous because it measured only increased costs rather than actual profit or loss. Benedict's own records indicated that even if production had been uninterrupted and all coal sold at the price actually received each month, a substantial loss would nevertheless have been sustained. Only to the extent that the loss was aggravated by the strikes is Benedict entitled to recovery from the Unions. Upon the present record, even if Benedict's figures are accepted as the basis [fol. 773] for the computation, the eight strikes which could properly have been found to be in violation of the contract could have increased Benedict's actual losses by not more than \$15,866.54.⁸

Date	Actual tonnage	Actual cost per ton	Average sales price per ton	Actual sales	Actual costs	Actual loss or gain
Apr —50	20,468.5	\$6.397	\$5.608	\$114,785.31	\$130,936.92	\$—16,151.61
Jul —51	11,828	5.264	5.563	65,803.37	62,259.35	+ 3,544.02
Oct —51	13,508.5	6.110	5.705	77,067.94	82,532.43	— 5,464.49
Nov —51	14,271.4	5.729	5.798	82,745.85	81,754.47	+ 991.38
Feb —52	16,033.6	6.130	5.492	88,064.28	98,283.03	—10,218.75
Apr —52	16,631.4	6.083	5.370	89,317.55	101,164.67	—11,847.12
Aug —52	8,460	5.907	5.315	44,962.39	49,972.94	— 5,010.55
May —53	6,114.4	7.503	5.557	33,975.53	45,879.66	—11,904.13

Net Actual Loss \$ 56,061.25

(footnote continued on following page)

Because of these errors affecting the amount of damages Benedict was entitled to recover from the Unions, the judgment must be set aside and the case remanded for a new trial upon that issue. By reason of what we have said on this review it is possible that additional or different evidence may be introduced upon the issue of damages at a retrial. Accordingly, nothing that has been stated here should be understood as fixing a maximum allowable recovery in a second trial.

We turn now to the separate issues raised by the Trustees' appeal. The jury found that Benedict was liable to the Trustees for unpaid royalties in the amount of \$76,504.26. Determining, however, that a set off of \$81,017.68 was intended, the district court ordered that the Trustees should recover only after Benedict's judgment against the Unions was paid. Accordingly, Benedict was granted execution of its judgment with instructions that the sum be paid into the registry of the court. From this [fol. 774] sum the Trustees were to receive \$76,504.26 and the balance was to go to Benedict. Because the Trustees' judgment was conditional, neither execution nor interest was granted. It is the Trustees' contention that this disposition was erroneous and that they are entitled to an unconditional judgment with interest for the \$76,504.26 representing unpaid royalties.

Date	Projected tonnage	Projected cost per ton	Average sales price per ton	Projected sales	Projected costs	Projected loss or gain
Apr —50	23,044	\$6.24	\$5.608	\$129,230.75	\$143,794.56	\$—14,563.81
Jul —51	13,516	5.142	5.563	75,189.51	69,499.27	+ 5,690.24
Oct —51	18,272	5.746	5.705	104,241.76	104,990.91	— 749.15
Noy —51	16,053	5.507	5.798	93,075.29	88,403.87	+ 4,671.42
Feb —52	17,635	6.008	5.492	96,851.42	105,951.08	— 9,099.66
Apr —52	18,647	5.954	5.370	100,234.39	111,024.24	—10,789.85
Aug —52	9,668	5.721	5.315	51,385.42	55,310.63	— 3,925.21
May —53	10,186	6.679	5.557	56,603.60	68,032.29	—11,428.69
Increase in Loss			\$15,866.54	Net Projected Loss		\$ 40,194.71

The heart of the Trustees' appeal lies in their contention that it was error for the district court to construe the 1950-52 agreement as making the Trustees third party beneficiaries of Benedict's promises. If the district court was correct, then defenses available against the unions were also available to Benedict as set-offs against the Trustees. In addition to permitting Benedict to set off damages resulting from breaches attributable to the Unions, the district court held that acts of individual employees of Benedict which caused damage to Benedict could be the basis for set-offs against the Trustees, even if the acts were not imputable to the Unions.

The Trustees assert that under the 1950-52 contract, title to the royalties passed to the Trustees immediately upon production of the coal. Consequently they argue that their cause of action was one to recover property held in constructive trust for them by the settlor, Benedict. If correct in these contentions, the Trustees would be immune from set-offs or claims which Benedict might have against the Unions or the individual employees.

The provision of the agreement specifically relied upon by the Trustees states: "Title to all moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust. . . ." Acceptance of the Trustees' interpretation would require the conclusion that the parties intended that the royalties become "due and owing" as soon as the coal left the ground. To thus construe the royalty provisions as being independent of the obligations assumed by the Unions would, however, be inconsistent with the agreement considered as an entirety. The 1950-52 agreement specifically provided: "This Agreement is an integrated instrument and its respective provisions are interdependent. . . ." Further, the provision requiring that the parties resort to the specified procedure for the settlement of local disputes is stated to be "part of the consideration of this contract." Hence we conclude [fol. 775] that the obligation to make payments to the Trustees was dependent upon performance by the Unions of their obligations, and consequently that the district

court was correct in ruling that the Trustees were third party beneficiaries of the contract and subject to the defenses arising from breaches by the Unions.

We cannot agree, however, that Benedict was entitled to a set-off against the Trustees for losses resulting from acts committed by individual employees not imputable to District 28 or the International Union. The individual employees were not parties to the agreement, so their acts clearly could not amount to a breach unless the acts were imputable to a contracting party. Benedict's contention, which was accepted by the district court, was that the individual members were beneficiaries of the Fund and that since the royalty payments were for their ultimate benefit, their misconduct would *pro tanto* relieve Benedict of the obligation to make the royalty payments.

This theory overlooks the nature of the Fund and its relationship to the individual employees. Though *sui generis*, union welfare funds created under the authority of 29 U. S. C. A., § 186 (c), are similar in some respects to charitable trusts. See *Van Horn v. Lewis*, 79 F. Supp. 541, 545 (D.D.C., 1948); Cf. *Hobbs v. Lewis*, 159 F. Supp. 282 (D.D.C. 1958). As in a true charitable trust, the actual beneficiaries of this fund are not ascertainable. Present employees who are potential beneficiaries may have an "interest" sufficient to enforce compliance with statutory requirements for administration of the fund, see *Wilkins v. De Koning*, 152 F. Supp. 306 (E. D. N. Y., 1957), but it is clear that the agreement did not contemplate vesting the employees with a present "interest" in the trust *res* so as to warrant a set-off in favor of the settlor.

This was made clear by the agreement, which provided that "no benefits or moneys payable from this fund shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void. The moneys to be paid into said fund shall not constitute or be deemed wages due to the individual mine worker, nor shall said moneys in any manner be liable for or subject to the debts, contracts, liabilities, or torts of the parties entitled to such money; i. e., the beneficiaries of said Trust under

the terms of this Agreement" [emphasis added]. These [fol. 776]-restrictions upon dispersal of the trust funds were applicable whether the party seeking to assert a claim was a third party or the settlor.

The Trustees, however, were not prejudiced by the error of the district court on this phase of the case. On the cross-claim the jury found that all of the acts in question were in fact caused or ratified by the Unions. The jury's finding on the set-off must also, therefore, have been on the basis of acts attributable to the Unions rather than to unauthorized conduct of individual employees.

Since the Trustees were properly determined to be third party beneficiaries and subject to defenses arising from breaches by the Unions, the district court correctly concluded that the judgment for the Trustees, to the extent that it was subject to a set-off, was conditional and not entitled to execution and interest. However, it is evident for the reasons discussed earlier that the losses for which Benedict may be compensated will be less than the amount of the Trustees' judgment, and the Trustees will be entitled to interest and execution on that part of the judgment in their favor which is in excess of the allowable set-off.

The judgments are set aside. Case No. 13,056 is remanded solely for a redetermination, in accordance with the views expressed in this opinion, of the amount of damages Benedict is entitled to recover from the Unions. The judgment in favor of the Trustees will then be amended by the district court to allow execution and interest on that part of the said judgment which is in excess of the set-off in favor of Benedict as so redetermined.

Nos. 13,055-56

MILLER, Circuit Judge, concurring in part and dissenting in part. I concur in the rulings of the majority opinion, except with respect to some of them involving the question of damages.

The majority opinion holds that, as a matter of law, liability for damages on the part of the unions could exist only in eight of the eleven work stoppages in issue, and that it was error to permit the jury to include in its ver-

dict damages alleged to have been caused by the remaining three work stoppages, referred to in the record as the "Water Strike," the "Collingsworth Strike," and the "Wage Stabilization Board Strike." I am of the opinion that it [fol. 777] was proper for the jury to consider what damage, if any, was caused by each one of the eleven work stoppages, instead of only eight.

With respect to the "Water Strike" and the "Collingsworth Strike" the majority ruling is that they were spontaneous work stoppages, rather than concerted strikes resulting from a labor dispute, and consequently did not constitute violations of the 1950-52 Agreement. There was evidence that Field Representative Scroggs of District 28 told members of the local, "Boys, I can't tell you. * * * I can't tell you boys when to strike. I can't come out and tell you to strike, but when I tell you when you don't get what you want why you boys know what to do then," and that this was understood by those who knew the language to mean, "Well, we knowed, when he told us that we knowed to strike." Section 4 of the 1950 agreement provided that the United Mine Workers would exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike pending adjustment of grievances in the manner provided by the agreement. There were two or three strikes over water without disciplinary action being taken by the unions. There was evidence that Scroggs supported the position of the strikers in the "Collingsworth Strike." In my opinion, this evidence was sufficient to take to the jury the factual issue of whether these strikes were of the "wildcat" type for which the unions were not responsible or were work stoppages either instigated or ratified by the union representatives in violation of the Agreement.

With respect to the "Wage Stabilization Board Strike" in October, 1952, it is true that the issue involved was national in scope and under the Agreement was not required to be settled by the machinery provided in the "Settlement of Local and District Disputes" section. But the amended agreement, effective October 1, 1952, also provided: "The United Mine Workers of America and the Operators agree and affirm that they will maintain the

integrity of this contract" and that in the case of disputes national in character "the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry," it being the purpose of this provision to settle such disputes by collective bargaining without recourse to the courts. The 1952 amendment provided for a per diem increase for the mine workers of \$1.90 a day. On October 18, 1952, the Wage Stabilization Board [fol. 778] fused to approve more than \$1.50 of this increase. Miners throughout the country went on strike, including miners of Benedict. Under date of October 21, 1952, the President of the United Mine Workers replied to a letter received from the President of the National Bituminous Coal Operators Association, in which he wrote in part as follows: "You assert that many miners are not working. You also know that they are outraged by the attempt of the N A M ruffians to filch milk money from their purse. They are acting as individuals. They are exercising their rights as individuals and freeborn Americans. They have not sought nor been given advice or suggestions by their Union or this writer. We have a contract. We expect your compliance with its provisions. Miners will work when you honor its provisions. If you do not like the contemptible action of the N A M labor baiters and the little Harvard professor and his quavering trio, appeal and ask for review and reversal. You are the sole petitioner and plaintiff." I do not believe that this Court can say as a matter of law that this action of the Union was not a violation of its contract obligation to "settle such disputes by free collective bargaining as heretofore practiced in the industry." The statutory concept of free collective bargaining is "the mutual obligation of the employer and the representatives of the employees to meet at reasonable times and confer in *good faith* with respect to *wages*, hours and other terms and conditions of employment, * * * " (Emphasis added). Sect. 158 (d), Title 29, U. S. Code, *N. L. R. B. v. American National Insurance Co.*, 343 U. S. 395, 409. Good faith requires an unpretending, sincere intention and effort to arrive at an agreement; it is a state of mind which can be resolved only through an application of the facts in each particular case. *N. L. R. B. v. Stanislaus*

Implement and Hardware Co., 226 F. (2) 377, 380, C. A. 9th. The Union's action in this instance could reasonably be construed as an approval of the action of the miners together with a recommendation to them that the strike continue irrespective of its purpose to compel Benedict to pay wages which would have been a violation of law on its part to pay. Although a labor union has the general right to strike for the advancement of its own economic interests, Section 163, Title 29, U. S. Code, such right does not include the right to strike to accomplish an unlawful purpose or to force an employer to act in violation of the laws or established policies of the United States Government. *United States v. Chattanooga Chapter, etc.*, 116 Fed. Supp. 509, 511, E. D. Tenn.; *N. L. R. B. v. Aladdin Industries*, 125 F. (2) 377, 380-381, C. A. 7th, cert. denied 316 U. S. 706; *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 256. Whether the action of the Union complied with its contract obligation to "maintain the integrity of this contract" and constituted a good-faith exercise of "free collective bargaining," as also required by its contract, is a question which in my opinion should be decided by the jury, rather than by this Court. *Allied Equipment Co. v. Weber Engineered Products*, 237 F. (2) 879, 883, C. A. 4th.

I concur in the ruling of the majority opinion that it was error to permit the jury to consider the claimed loss of \$6,000.00 representing the replacement cost of a cable which was destroyed by a forest fire; but I am not in accord with its holding on the question of the amount of damages caused by the other work stoppages considered by it.

With respect to the claimed loss of \$21,534.85 resulting from the abandonment of a construction project, the evidence was that that amount was the cost of the labor and material which went into the incompleeted project. The majority opinion, in rejecting this item of damage as a matter of law, treats the abandonment of the project as a voluntary act on the part of Benedict, holding that Benedict was not damaged in that it received materials and services for the entire \$21,534.85 which it expended. Such rule is not applicable; however, if the abandonment of the project was not a voluntary act on the part of Benedict.

Harris v. The Cecil N. Bean, 197 F. (2) 919, 921-922, C. A. 2nd; Restatement, Contracts, Sect. 357 (1) (a). If the unions were responsible for the abandonment of the project, Benedict would not be chargeable with the cost of the materials and services which went into the project, but rather only with the amount of the benefit which it received from such materials and services. *Morton v. Roanoke City Mills, Inc.*, 15 F. (2) 545, 547, C. A. 4th; *In re: Irving-Austin Bldg. Corporation*, 100 F. (2) 574, 578, C. A. 7th; *Schwasnick v. Blandin*, 65 F. (2) 354, 357, C. A. 2nd; Restatement, Contracts, Sect. 357 (3). Whether the abandonment of the project was voluntary on the part of Benedict was a factual issue in the case. There was substantial evidence on the part of Benedict that the labor trouble and pressure became so great the contractor was forced to [fol. 780] quit, which in my opinion was sufficient to take such factual issue to the jury. There was also evidence that Benedict did not get a dollar's worth of use out of the work, that the work had not progressed to the point where it could have been used for anything, and that the investment was a complete loss. What benefit, if any, Benedict received from the partial performance of the contract, likewise seems to be a jury question.

With respect to other work stoppages, Benedict introduced evidence showing the difference between the cost per ton of the coal actually mined and the decreased cost per ton if production had not been suspended by the strikes. This increase in fixed costs per ton was multiplied by the number of tons which would have been produced during the month if production had not been suspended during the strikes, and the resulting amount claimed as the loss sustained because of the strike. I agree with the majority ruling that this formula did not correctly show the damage. It included the increased cost of production on tonnage that was not mined. With respect to tonnage that was not mined, Benedict's damage was the loss of profits which would have resulted if such tonnage had been produced and sold. Increased cost of production is only one element affecting profits. *United States v. Griffith, etc.*, 210 F. (2) 11, 14, C. A. 10th. It was not shown that this tonnage, if produced, would have been

sold at a profit. It is contended that it would have been sold at a loss if it had been mined, in which event Benedict was not damaged. With respect to the tonnage that was not mined, the question of what damage, if any, was sustained by Benedict by reason thereof, should have been submitted to the jury under instructions applicable to lost profits. *Yates v. Wharf Coke Co.*, 221 F. 603, 607, C. A. 6th; *Roseland v. Phister Mfg. Co.*, 125 F. (2) 417, 420, C. A. 7th. See: *Union Cotton Co. v. Bondurant*, 188 Ky. 319, 323-324.

With respect to the coal that was mined by Benedict, Benedict's damage was the amount by which its profits were reduced by the strike, or if the coal was produced at a loss, the amount by which the loss was aggravated by the strike. Increased cost of production caused by the strike was a proper element for the consideration of the jury.

[fol. 781]

IN UNITED STATES COURT OF APPEALS

ORDER SUBSTITUTING TRUSTEE-APPELLANT—Filed
October 16, 1958

No. 13,055

Upon motion of Henry G. Schmidt, and with the assent of John L. Lewis and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund, through their attorneys, and with the assent of the Benedict Coal Corporation through one of its attorneys, it is ordered that Henry G. Schmidt be substituted for Charles A. Owen as Trustee of the United Mine Workers of America Welfare and Retirement Fund as one of the appellants in this cause.

[fol. 782] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 783]

SUPREME COURT OF THE UNITED STATES

No. 562, October Term, 1958

JOHN L. LEWIS et al., Petitioners,

VS.

BENEDICT COAL CORPORATION.

ORDER ALLOWING CERTIORARI—February 24, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is consolidated with No. 563 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stewart took no part in the consideration or decision of this application.

[fol. 784]

SUPREME COURT OF THE UNITED STATES

No. 563, October Term, 1958

UNITED MINE WORKERS OF AMERICA, et al., Petitioners,

VS.

BENEDICT COAL CORPORATION.

ORDER ALLOWING CERTIORARI—February 24, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted limited to question 1 presented by the petition for the writ which reads as follows:

"1. Where (1) the settlement of disputes section of collective bargaining agreements antedating 1950 provided that Mine Workers shall not engage in a work stoppage pending settlement of disputes under grievance machinery procedures and such agreements contained other 'no strike' clauses, and (2) under the Labor Management Relations Act, 1947,^{1a} the right to strike became a bargainable subject, and (3) in 1950 UMW and coal operators signatories to the National Bituminous Coal Wage Agreement of 1950, deleted such clauses therefrom and expressly covenanted that the 'no strike' clauses in prior agreements were rescinded and made null and void, and (4) signatories to such 1950 Agreement covenanted that stoppages, as well as disputes, shall be settled exclusively under grievance machinery procedures set forth in such contract, is a stoppage of work pending settlement of a dispute cognizable under the grievance machinery procedures prescribed [fol. 785] thereby and a violation of the 1950 Agreement so as to subject UMW and District 28 to damage actions under the Act's Section 301?"

The case is consolidated with No. 562 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stewart took no part in the consideration or decision of this application.

^{1a} The Labor Management Relations Act, 1947, is herein called the "Act."

No. ~~568~~ 563

IN THE

18 & 19

Supreme Court of the United States

OCTOBER TERM, 1919

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE
ROCHE, AS TRUSTEES OF THE UNITED MINE WORK-
ERS OF AMERICA WELFARE AND RETIREMENT FUND,
Petitioners,

v.

BENEDICT COAL CORPORATION

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No.

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE
ROCHE, AS TRUSTEES OF THE UNITED MINE WORK-
ERS OF AMERICA WELFARE AND RETIREMENT FUND,
Petitioners,

v.

BENEDICT COAL CORPORATION

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT**

*To the Honorable, the Chief Justice and Associate
Justices of the Supreme Court of the United
States:*

Your Petitioners, John L. Lewis, Henry G. Schmidt¹
and Josephine Roche, as Trustees of the United Mine
Workers of America Welfare and Retirement Fund,
pray that a writ of certiorari issue to review the judg-

¹ A motion, reciting the death of Charles A. Owen and the ap-
pointment of Henry G. Schmidt, as successor Trustee, and seeking
substitution of said Henry G. Schmidt as an appellant herein, was
sustained by the Sixth Circuit by order filed October 16, 1958.
Copy of such order appears at the end of Vol. II of the certified
Record filed with this Court.

ment of the United States Court of Appeals for the Sixth Circuit entered in this cause on September 26, 1958.

OPINIONS BELOW

Copy of the opinion of the District Court² on motion for summary judgment and orders entered with reference thereto and copy of judgment of the District Court and of that Court's order overruling petitioners' motion to amend that judgment are appended as Appendix I hereto (A. p. 1a).³ Included therein also is the Court of Appeals' judgment (Case No. 13,055) aforementioned (A. 8a).

The opinion of the Court of Appeals is reported in 259 F. 2d 346 (Adv. Op. November 17, 1958). A copy is appended as Appendix II (A. p. 9a).

JURISDICTION

Jurisdiction to review by writ of certiorari the judgment of said Court of Appeals entered September 26, 1958, is invoked under the provisions of 28 USCA Sec. 1254 (1).

On October 21, 1958, upon motion therefor by petitioners, said Court of Appeals stayed its mandate on said judgment upon condition that a petition for writ of certiorari be filed with this Court within 30 days thereafter. At a later date and within said 30-day period, said Court of Appeals entered an order further staying its mandate on said judgment for an additional period of 15 days.

²The District Court referred to in this Petition, unless otherwise indicated, is the United States District Court for the Eastern District of Tennessee.

³The abbreviation "A." refers to the Appendix to this Petition.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The basis for Federal jurisdiction in the United States District Court of the original complaint was diversity of citizenship between the plaintiffs and the defendant and the amount involved.

The cross-claim was filed pursuant to Sections 301 and 303 of the Act (Title 29, U.S.C.A. Secs. 185 and 187).

QUESTION PRESENTED

In an action by the Trustees of an irrevocable trust created under a collective bargaining agreement entered into by bituminous coal operators and United Mine Workers of America^{3a} pursuant to Section 302(c)(5) of the Labor-Management Relations Act, 1947,⁴ for the benefit of the employees of all the employer-settlers of the trust, which action is brought against one individual employer-settlor seeking to recover moneys due the trust under trust provisions of collective bargaining agreements which expressly vested title to such moneys in the Trustees, may such one employer-settlor set off damages sustained by it alone against moneys title to which had passed to the Trustees, because of alleged conduct on the part of the said labor organization in violation of the Act and of the collective bargaining agreements.

The United States Court of Appeals for the Sixth Circuit concurred with the District Court in permitting such a set off, petitioners having contested that conclusion in both of said Courts.

^{3a} United Mine Workers of America will be referred to herein as "UMW".

⁴ Herein called the "Act".

STATUTES INVOLVED

Involved herein are Sections 301 and 302 of the Act (29 U.S.C.A., Sections 185 and 186), copy of the pertinent portions of which is appended as Appendix III (A. p. 29a).

STATEMENT OF THE CASE

The question here presented arises from an interpretation of certain provisions of said Act and the provisions of collective bargaining agreements entered into between bituminous coal operators and UMW pursuant to authorization granted by the Act's Section 302(c)(5).

This action was commenced by the Trustees of the United Mine Workers of America Welfare and Retirement Fund in the District Court against Benedict Coal Corporation, to recover trust property exceeding \$75,000 on coal mined by Benedict.

The plaintiffs had become such Trustees as a consequence of provisions of the National Bituminous Coal Wage Agreement of 1950 which provisions were carried forward in amendments to that Agreement in 1951 and again in 1952 (R. pp. 88a, 118a, 108a).⁵ Benedict, along with numerous other coal operators and associations responsible for the production of a great preponderance of the nation's bituminous coal, had executed said Agreements with UMW. In the 1950 Agreement, in addition to attempting to establish for the United States' bituminous coal industry a mine safety program, workmen's compensation

⁵ The National Bituminous Coal Wage Agreement of 1950 will herein be called the "1950 Agreement"; that Agreement as amended in 1951, the "1951 Agreement"; and the 1950 Agreement as amended in 1952, the "1952 Agreement". The abbreviation "R:" used herein refers to the Certified Record filed in this Court.

and occupational disease benefits, wage and hour rules, vacation pay, etc., the parties also created the United Mine Workers of America Welfare and Retirement Fund (herein called "Fund") pursuant to the Act's Section 302(c). To the Trustees of the trust each signatory coal operator, including Benedict, therein agreed to pay a specified sum "on each ton of coal produced for use or for sale" and the Trustees designated in that instrument were required to administer the trust for those persons entitled to receive its benefits, namely, employees of the signatory operators, their families and dependents as set forth in the agreement. While in the agreements immediately antecedent to the 1950 Agreement, only title to moneys paid into a predecessor trust vested in the Trustees thereof, the 1950 Agreement specifically provided that "*Title to all the moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund*", as an irrevocable trust. (R. p. 96a). These provisions were expressly carried forward in the 1951 and 1952 Agreements. (R. 118a, 108a).

In its answer filed in this action, Benedict denied liability to the Trustees for the sum sought on several grounds, but none of those grounds is material to the question presented by this Petition for Certiorari. Simultaneously, however, with the filing of Benedict's answer denying liability and under the Act's Sections 301 and 303 (29 U.S.C.A. Sec. 185, 187), Benedict filed a cross-claim for damages against UMW and United Mine Workers of America, District 28 (herein called "District 28") [R. pp. 25a, 37a, 41a and 61a] alleged to have resulted from strike activity claimed by Benedict to be violative of the 1950, 1951 and 1952 Agreements and said Section 303.

At the trial, the District Court instructed the jury, inter alia, that if it found that there was a breach of the Agreements, either by UMW and or District 28, or that either of them violated any of the secondary boycott provisions of the Act, and that as a result Benedict sustained damages, the jury should set off such damages against any amount awarded the Trustees. (R. p. 733a).

The jury found that the Trustees were entitled under the collective bargaining agreements to recover from Benedict trust property amounting to \$76,504.21. The jury further found that Benedict was entitled to set-off against that total, the amount of \$81,017.68, the latter sum being the amount which the jury found that Benedict was entitled to recover in its cross-claim for damages against UMW and District 28. (R. p. 74a).

The District Court thereupon entered judgment against UMW and District 28 for \$81,017.68 in favor of Benedict and ordered execution for such amount to issue, said sum to be paid into the registry of the Court. In so far as the judgment rendered in favor of the Trustees is concerned, the judgment entered by the District Court reads as follows:

"It is further ordered that said sum of \$81,017.68 be paid into the registry of the Court to be disbursed by the clerk in accordance with instructions appearing below.

"It is further ordered that said Trustees, in accordance with the verdict rendered in their favor, have and recover of Benedict Coal Corporation the sum of \$76,504.26, said recovery to be had in the manner following: From the aforesaid \$81,017.68 ordered paid into the registry of the Court, that the sum of \$76,504.26 be paid to said Trustees. That the difference between

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\$76,504.26 and \$81,017.58 be paid to Benedict Coal Corporation." (R. p. 76a).

Thereafter the Trustees unsuccessfully moved the District Court to have the judgment provide therein for interest thereon from the date of institution of suit and also for the issuance of execution against Benedict for the collection of the entire amount of the Trustees' judgment and to eliminate from the judgment the provision that the recovery awarded the Trustees be satisfied out of Benedict's judgment against UMW and District 28. (R. p. 82a). The District Court assigned two reasons for denying the motion:

(1) Its determination that the Trustees were third-party beneficiaries to the Agreements and as a result the sum certain owing to them as royalties was rendered uncertain by possibility of set off because of violation by UMW and District 28 of certain provisions of the Agreements, and

(2) Because of its determination that the Trustees were third-party beneficiaries to the Agreements, they have a right to unconditional judgment against Benedict for only such sum as any judgment rendered in their favor for royalties due exceeds damages adjudged against UMW and District 28 and inasmuch as under the verdict of the jury no such excess exists an unconditional judgment against Benedict will not be entered in favor of the Trustees. (R. p. 85a).

It was the position of the Trustees, both in the District Court and in the Court of Appeals, that under the several Agreements title to the trust res passed to the Trustees immediately upon coal production, so

that any claim which Benedict might have had against UMW and/or District 28 could not and may not be utilized as a set-off against the Trustees' right to recover such trust res, title to which had vested in the Trustees. The action of the Trustees therefore was one to recover trust property and was immune to set offs or claims which Benedict might have against UMW and/or District 28.

The Court of Appeals held that the obligation by Benedict to make payments to the Trustees was dependent upon performance by UMW and District 28 of their obligations to Benedict and consequently they were third-party beneficiaries of the Agreements and subject to the defenses arising from the conduct of UMW and District 28. (A. p. 21a). Reversing the judgment in Trustees' case and in the one against UMW and District 28 and remanding the latter solely for a determination of damages, the Court of Appeals opinion directed that the Trustees' judgment "will then be amended by the District Court to allow execution and interest on that part of the said judgment which is in excess of the set-off in favor of Benedict as so redetermined" (A. 8a, 22a-3a). The order (A. 8a) directs that the District Court judgment be set aside "for amendment" in accordance with the opinion.^{5a}

ARGUMENT—REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals has decided an important federal question involving the administration of a trust created under the authority of the Act's Section

^{5a} The Court of Appeals' judgment in Trustees' case (No. 13,055) appears in the Appendix, hereto, p. 8a. On the same page appears that Court's judgment against UMW and District 28 (Case No. 13,056).

302 and contained in collective bargaining agreements, national in scope, in such a way that the District Court and the Court of Appeals have departed from accepted principles governing the administration of trusts with a result that the intent of Congress, with reference to the administration of trusts created pursuant to the Act, is thwarted. The thrust of the courts' reasoning and judgments is to jeopardize the stability of all trusts resultant from collective bargaining, and consequently to be deprivative of welfare and pension benefits relied upon by employee beneficiaries of such trusts. The large number of persons covered by welfare and pension programs emphasizes the significance of the impact of the courts' decision in the instant case." Further, and pertinently, the Sixth Circuit has cited no decisional law to support its conclusion. Thus, there is presented an important federal question which has not been, but should be, settled by this Court.

The Trustees sue as Trustees seeking to recover trust property, title to which had vested in them, and not as third-party beneficiaries to a contract.

The fundamental error in the holding of the Trial Court, we submit, is that the Court considered the Trustees in this action as third-party beneficiaries to the Agreements. It was upon the basis that the Trustees were such beneficiaries that the Trial Court found

"In the 'Final Report Submitted to the Committee on Labor and Public Welfare by Its Subcommittee on Welfare and Pension Funds, Pursuant to Senate Resolution 40, as extended by Senate Resolution 200 and 232', which report deals with 'Welfare and Pension Plans Investigation', it is said: 'Over 75 million persons, employees and dependents, or about one-half of the population of the Nation, are covered in some measure by employee welfare and pension programs. This tremendous development has come about principally in the past 10 years' (Page 5).

that the Trustees' claim was subject to a set-off by virtue of the alleged breach of contracts and violation of the Act, on the part of UMW and District 28. The Court of Appeals reached the same conclusion.

The Trustees contend with respect to the unpaid royalties—the obligation upon which they seek judgment—that such unpaid royalties, by virtue of the language of the several Agreements and the conduct of the parties thereunder, are trust property in the hands of the employer-settlor, Benedict, and that such trust property in the hands of Benedict became impressed with such trust upon the production of coal from which the obligation is computed.

The material language in the trust instrument contained in the Agreement provides (R. 96a):

“Title to all the moneys paid into *and or due and owing* said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust . . .”⁷

If meaning is to be given to the above quoted language, it must result in a determination that Benedict's unpaid obligation, title to which is vested exclusively in the Trustees, is property impressed with a trust in Benedict's hands as an employer-settlor.

That such was the intention of the contracting parties becomes even more clear when the language of the contract which preceded the 1950 Agreement is considered. The National Bituminous Coal Wage Agreement of 1947 (Exhibit 15, R. 126a; R. 755a) provides that:

⁷ All emphases of provisions in the Agreements are supplied.

“*Title to all the moneys paid into said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust . . .*” (Emphasis supplied)

Under this earlier Agreement title vested in the Trustees only as to “*moneys paid into said Fund*”. The difference in this language and the comparable provisions of the 1950 Agreement and as carried forward in the 1951 and 1952 Agreements—“*moneys paid into and or due and owing*”—shows, we submit, an unmistakable intent of the parties to create a trust at the time a particular obligation became computable.

In *Lewis v. Quality Coal Corporation*, (CA-7), 243 F.2d 769, the Seventh Circuit held that the moneys which were due but unpaid by Quality Coal Corporation to the Trustees of the United Mine Workers of America Welfare and Retirement Fund, were held by that corporation upon a trust. Hence the trust res due and owing by Benedict is likewise held by that company upon a trust accordant with Benedict's trust covenant as an employer-settlor. A teaching of the *Quality Coal Corporation* case is that UMW “is in no way interested” in the trust property “except to see that the trustees perform their trust duties” (243 F. 2d 773). Therein (p. 773) it was further declared that

“No person is legally interested in this controversy except plaintiffs, who, as trustees, claim the right to recover, and defendant who has agreed to pay the royalties demanded.”

The authorities are positive in holding that a trust is created in such a situation.

The proposition is stated in 89 C.J.S., Trusts, sec. 24, p. 741, in the following language:

"It has been held . . . that a declaration of trust of property executed before the acquisition of the property, but which is subsequently acquired, does not fail for want of the requisite subject matter, *but that the instrument takes full effect when the subsequent title vests in the declarant.*" (Emphasis supplied)

In comment "k" under section 26, p. 85, of the *Restatement of the Law of Trusts*, it is said:

"k. . . . Thus, if a person executes a declaration of trust of certain property not at the time owned by him and he thereafter purchases property of that description, the act of acquiring the property coupled with the earlier declaration of trust may be a sufficient manifestation of an intention to create a trust at the time of the acquisition of the property."

That a trust may arise automatically upon acquisition of the res is stated in *Grubb v. General Contract Purchase Corporation* (CA-2, 1938), 94 F. 2d 70, 73, as follows:

" . . . it is also true that a declaration of trust may precede acquisition of the res, and attach to it thereafter."

Other authorities setting forth the principle here discussed are:

Merritt Oil Corporation v. Young, (CA-10, 1930) 43 F. 2d 27, 29-30

Brainard v. Commissioner of Internal Revenue, (CA-7, 1937) 91 F. 2d 880, 882-883

Universal Ins. Co. v. Steinbach, (CA-9, 1948), 170 F. 2d 303, 305

The Court of Appeals' conclusions that Benedict's "obligation to the Trustees was dependent upon performance by the Unions of their obligations" and therefore the Trustees were third party beneficiaries, "subject to the defenses arising from breaches by the Unions" (A. 20a) are emasculatory of the trust agreed to by the Agreements' employer-settlors, including Benedict. A vice of the Court of Appeals' reasoning is readily discernible when, despite the trust provisions' clear and positive language that "moneys . . . due and owing . . . shall be vested" in the Trustees, the Court of Appeals rejected Trustees' position because that would mean that the trust property became "due and owing" as soon as the coal left the ground" (A. 20a). The express covenant in the 1950 Agreement that employer-settlors make payments on the 10th day (later changed to the 18th) of each calendar month covering production of all coal for use or sale during the preceding month (R. 97a, 114a) challenges the judgments of the District Court and the Court of Appeals, the effect of which is to postpone delivery of the trust res until UMW and District 28 pay the judgment and, indeed, conditions such delivery upon their paying the judgment against them. Not only is there no warrant for this result to be found in the Agreements, but, to the contrary as already observed, delivery of the trust res on a specified date—and without any condition attached—is specifically provided. The offending courts have not only reformed the parties' agreement, but have violated the rule that "Express stipulations cannot, in general, be set aside or varied by implied promises". 12 Am. Jur., Contracts, Sec. 239, p. 768; *Ferrolinc Corp. v. General Aniline & Film Corp.*, (CA-7), 207 F.2d 912, 926. The Court of Appeals' insistence that Benedict's

obligation was dependent upon performance totally disregards the fact that it was actual performance under the Agreements—namely, the production of coal by Benedict's employees—which created the trust property, title to which vested in the Trustees and which Benedict wrongfully withheld from the Trustees. In denying to the Trustees their unconditional right to such trust property by refusing them the process of execution, both the District Court and the Court of Appeals have thus given aid to an employer-settlor admittedly guilty of breaching his covenant to pay in accordance with the Agreements. Further, it must be remembered that herein trust property which Benedict agreed to deliver in 1950 is now withheld because of alleged strike activity occurring even as late as 1953.

It is not amiss at this juncture to point out that the trust property sought by Trustees in this action is, as the trust provisions expressly recite, an "irrevocable trust" (R. 96a) for delineated "benefits to employees of said Operators, their families and dependents" (R. 95a) and not limited to Benedict's employees alone. Indeed the Court of Appeals recognized that Benedict's employees had only a "potential" and not a "present interest" in the trust res" (A. 21a). Yet, to deprive Trustees of an unconditional judgment for recovery of the trust res, especially when Benedict's obligation to deliver to the Trustees the trust property is a transaction wholly separate from situations upon which Benedict's claims against UMW and District 28 are predicated, effectuates a penalty upon employees of all other employer-settlors as "potential" beneficiaries by making recovery of the trust res conditional upon a tort-feasor's ability to pay a judgment against it.

Moreover, if the set-off is permitted as authorized by the District Court and Court of Appeals, the money against which the set-off is allowed in favor of the employer being trust res, the result thus established has the effect of revoking the trust which was impressed upon the moneys owing by the employer to the Trustees.

Under the long recognized principles of trust law, the settlor has power to revoke a trust only to the extent that by the terms of the trust he has reserved such power. In the instant case, Benedict reserved no such power and the trust was unconditional (except as to coal production) and declared irrevocable.

In the *Restatement of the Law of Trusts*, Sec. 330, at page 984, the following statement is made:

"The settlor has power to revoke the trust if and to the extent that by the terms of the trust he reserved such a power."

The foregoing rule is, we submit, supported by an unbroken line of authorities.

In *Boycott on Trusts*, Vol. 4, Part 2, Sec. 993, p. 429, the following statement is made:

"If a trust has been created, it results in the vesting of property rights in the cestuis with regard to the trust subject-matter. If these property rights were absolute and unconditional, they cannot be taken from their owners without action on the part of such owners by way of surrender or conveyance. The creator of those property rights, whether for a consideration or voluntarily, cannot resume his former position as owner merely because of a change of mind or a feeling that he

has unwisely given or conveyed for a consideration."

The Court in the case of *Fricke v. Weber* (CA-6, 1944), 145 F. (2d) 737, in considering the right of a settlor to revoke a trust, said (page 739):

"As no reservation was made of a right to alter or revoke the trust, under both common law and the Ohio decisions it was irrevocable without the consent of the beneficiary."

In *Scott on Trusts*, 2d Ed., Vol. III, Sec. 330.1, p. 2394, the following statement is made:

"Where the creation of a trust is evidenced by a written instrument which purports to include the terms of the trust, and there is no provision in the instrument expressly or impliedly reserving to the settlor power to revoke the trust, the trust is irrevocable."

We submit that the conclusion of the Court of Appeals in this action is at variance with established principles governing the administration of trusts, is likewise at variance with the intent of the parties entering into the subject collective bargaining agreements, and brings about a result which thwarts the Congressional purpose with reference to the establishment of trusts pursuant to the Act; and it is erroneous.

II.

The Act's Section 301(b) mandates that money judgments against a labor organization in a federal district court "shall be enforceable only against the organization as an entity and *against its assets*". (Emphasis supplied). Where, as in the instant case, the recovery of trust property by Trustees of a trust is

conditioned upon, and postponed until, UMW's and District 28's payment of the money judgment entered against them, an employer-settlor is permitted to withhold from the Trustees the trust property, title to which has vested in them. If, under Section 301(b), judgment debtors are unable to discharge the money judgment, the effect of such conditional judgment to trust property results in payment of the money judgment against the labor organization, not out of its assets as Section 301(b) makes mandatory, but by withholding the trust property the judgment creditor derives satisfaction of his money judgment from the trust property, title to which was not in the labor organization but in the trustees of the trust. The pattern utilized by the District Court, with the Court of Appeals' approbation, could thus serve as precedent to endanger the very existence of employee trusts created in collective bargaining agreements, congressionally-permitted and juridicially recognized as a social device to be encouraged, through the medium of a federal court judgment in conflict with the command of Section 301(b). The potential inconsonancy of such pattern and device with Congress' directive in Section 301(b) merits review of the instant case by this Court.

Under the pattern of the District Court's judgment, approved by the Court of Appeals, the denial of the right to have execution issued to Trustees on their judgment has the legal effect of rendering that judgment legally impotent, for although the judgment itself recognizes that Trustees are entitled to trust property improperly withheld from them, rejection of the execution process results in denying to them the very trust property which the judgment connotes belongs to them. Instead of requiring Benedict to implement the finding that

the Trustees were entitled to the trust property, the judgment makes the Trustees' right of recovery dependent upon UMW's and District 28's response to the money judgment against them, a pattern utterly at variance with Benedict's promise in the Agreements to deliver the trust res to Trustees each month following production of coal.

If the pattern of conditional judgment, of which complaint is herein made, is permitted to stand, then its potential conflict with the Act's Section 301(b) is apparent.

Section 301(b) provides in part:

"... Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

Despite judicial support for the proposition that the trust fund is an entity separate and distinct from UMW (*Quality Coal Corp., supra; United Marine Division v. Essex Transportation Co., (CA-3), 216 F. 2d 410; International Ladies' Garment Workers, AFL v. Jay Ann Co., Inc., (CA-5), 228 F. 2d 632*), the Court of Appeals held that "defenses available against the Unions were also available to Benedict as set-offs against the Trustees." (See Appendix II here-to p. 20a). These "defenses" constituted certain alleged breaches of the collective bargaining agreement and violations of the secondary boycott provisions of the Act. Such defenses as construed by the District

Court and the Court of Appeals are not defenses in the sense that they would defeat or destroy the Trustees' claim, but are defenses, if valid, measurable in dollars and available by way of set-off against the Trustees' right to the recovery of trust property, title to which Benedict had, in the Agreements, agreed was vested in the Trustees. The defenses as thus held applicable by the lower courts have the legal effect of neutralizing the Trustees' right to such trust property against the employer-settlor and the claim of the employer against UMW and District 28 at the same time.

It may be contended that the Trustees' right is not neutralized in the present case by virtue of the manner in which the District Court gave effect to the verdict of the jury. The District Court's judgment required UMW and District 28 to satisfy the judgment rendered against them by making payment of the amount thereof into the registry of the Court and that out of the moneys so paid the amount found to be due and owing the Trustees be paid, thus satisfying the Trustees' conditional judgment. The balance of the money paid into Court was directed to be paid to the employer. (See Appendix I hereto, p. 6a).

The Court wholly overlooked the wording of the Act which expressly provides that "any money judgment against a labor organization in a District Court of the United States shall be enforceable only against the organization as an entity *and against its assets.*" Moneys owing to the Trustees by the employer as royalties on coal mined constitute trust property, title to which has vested in the Trustees and are not assets of the union judgment debtors, but are, in fact, assets of the trust. Therefore, permitting the employer to be made whole for his damages out of such

trust property of the Trustees is in direct contravention of the Act. On the other hand, if the union judgment debtor be financially unable to pay into Court the judgment rendered against it, and the amount of such judgment is equal to or greater than the amount the damaged employer owes to the Trustees in royalties, the union judgment debtor will have paid the damages awarded against it, not out of its assets as required by the Act, but in an entirely different manner and from funds in which, as the Court said in the *Quality Coal Corp.* case, it "is in no way interested" (243 F. 2d 773).

Furthermore, if this so-called right of set-off is held to exist under the circumstances here involved, the very purpose of Section 301(b) of the Act may be defeated. In discussing trust funds under the Act, on the floor of the Senate, its sponsor, Senator Taft, stated:

"The purpose of the provision is that if the welfare fund shall be a perfectly definite fund, that its purposes shall be stated so that each employee can know what he is entitled to, can go to court and enforce his rights in the fund, and that it shall not be, therefore, in the sole discretion of the union or the union leaders and usable for any purpose which they may think is to the advantage of the union or the employee The tendency is to demand a welfare fund as much in the power of the union as possible. Certainly unless we impose some restrictions we shall find that the welfare fund will become merely a war chest for the particular union" 93 Cong. Rec. 4746-7 (1947). [Emphasis Supplied]

If the so-called claim of set-off or right of set-off as decreed by the District Court and the Court of Ap-

peals in this case exists, then the "perfectly definite fund" referred to by Senator Taft cannot exist because the amount of the trust is not dependent upon production alone but is inextricably tied to possible torts committed by labor organizations in matters apart from the actual performance from which the trust res ensues.

It is generally recognized that trusts of the type we are now considering represent a social device which deserves to be encouraged and protected. *Upholsterers' Inter. Union v. Leathercraft Furn. Co.*, D.C. E.D., Pa., 1949, 82 F. Supp. 570, 575. This was the spirit under which this Act was written.

We submit that the construction placed upon this Act and upon the collective bargaining agreements here involved by the District Court and the Circuit Court of Appeals brings about a result which is wholly at variance with the Congressional intent in its enactment and is erroneous.

CONCLUSION

We submit that the question presented in this petition should be approached with the thought in mind that these trusts represent a social device to be encouraged. The Congress in the enactment of the Labor-Management Relations Act, 1947 has thrown about such trusts, when created pursuant to that Act, a protection that should not be whittled away by Court decisions. The result of the decision of which review is herein sought vitally affects the sanctity of such trusts.

For the reasons stated, it is respectfully submitted that this ~~petition~~ writ of certiorari should be granted.

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APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION, AT GREENEVILLE, TENNESSEE

Civil Action No. 944

JOHN L. LEWIS, CHARLES A. OWEN, and JOSEPHINE ROCHE,
as Trustees of the United Mine Workers of America
Welfare & Retirement Fund, *Plaintiffs*,

v.

THE BENEDICT COAL CORPORATION, a Virginia Corporation,
Defendant.

Opinion of the Court

February 17, 1956

This matter is before the Court on plaintiffs' motion for summary judgment.

Plaintiffs Lewis, Owen and Roche, are trustees of the United Mine Workers of America Welfare & Retirement Fund, and the defendant, the Benedict Coal Corporation, is one of the coal operators that entered into an agreement with United Mine Workers of America wherein and whereby this fund was to be established.

The Court file at this time shows that the coal company paid into the fund a substantial amount of money which it seeks to have returned in this litigation on the theory that the beneficiaries of the fund breached the contract with the coal company in that the miners walked off of the work while working for the coal company without submitting their alleged grievances to arbitration or peaceful settlement as provided for in the contract. This is one of the issues that will have to be decided in this litigation and which cannot be decided on a motion for summary judgment in view of the pleadings as a whole.

Counsel on each side here today state that that is a sharply controverted issue of fact as well as law insofar as it applies to these three trustees. If the parties could agree upon the facts the Court could, in due time, reach a decision on the question of law.

One legal question involved in this motion for summary judgment is whether the coal operator, and that means the Benedict Coal Corporation, is entitled to have the trustees pay back to it all the monies paid into this fund on the two alleged grounds that, first, the trustees breached this contract in that they changed the policy as set forth in the contract by eliminating benefits to certain individuals who were entitled to these benefits under the specific terms of the contract and under the National Labor Relations Law which was the enabling act for the contract.

From an examination of the National Labor Relations Law, the contract involved in this litigation and the supplements thereto, the affidavits filed by the three trustees and entire record, the Court is of the opinion that the trustees were given comprehensive discretionary powers under the National Labor Relations Act and under the contract itself in carrying out the provisions of the law and the terms of the contract by deciding the classes of people entitled to the benefits and amounts that the trustees could pay periodically.

The affidavits which are not challenged by counter-affidavits, convince the Court that the trustees have not breached the contract in the respect indicated.

The Court is of the opinion that the trustees have handled the funds in accordance with the applicable law and the provisions of the contract.

If therefore follows, as a matter of law, that the coal company is not entitled to recover any funds paid into this fund or to defend this complaint upon the theory that

the three trustees breached the contract between the coal operator and the coal miners in handling the trust funds.

Another legal question raised by the motion for summary judgment is that the coal company is entitled to recover back from the three trustees all the monies it has paid into this fund for at least two reasons: (1) Because the beneficiaries of this fund breached the contract with the coal company in that they engaged in strikes contrary to the terms of this contract; and for the additional reason which has just been disposed of.

The Court is of the opinion and holds that this money was paid over to the trustees and became an executed trust, and that as a matter of law the coal company is not entitled to recover the amounts which it paid in and which are either now held by the trustees or which have been paid out to beneficiaries by the trustees in accordance with the applicable law and the contract involved in this suit.

This motion also raises another question, and that is that the trustees are entitled as a matter of law to a judgment for the royalties which have not been paid on the coal which was mined during the period of time involved in this litigation. The royalty was thirty cents per ton during a part of the period and forty cents per ton during the other part of the period.

In reply to this insistence, the coal company says, among other things, that the trustees are not entitled to recover the unpaid amounts of the royalties for certain reasons, the chief one of which is that the third-party beneficiaries of this fund breached the contract with the coal company thereby making the performance of the contract by the company impossible.

If the coal company can establish this defense by proof, in the opinion of this Court it is a legal defense to the claim of these trustees.

The Court concludes, therefore, that the motion for summary judgment is sustained to the extent indicated, and denied to the extent indicated.

Civil Action No. 944

(Greeneville)

JOHN L. LEWIS et al., Trustees, *Plaintiffs*,

v.

THE BENEDICT COAL CORPORATION, *Defendant and Cross-Plaintiff*,

v.

UNITED MINE WORKERS OF AMERICA, and UNITED MINE WORKERS OF AMERICA, DISTRICT 28, *Cross-Defendants*.

Verdict Form

1. In the named suit of the Trustees against Benedict Coal Corporation we find that plaintiff Trustees are entitled to recover as unpaid royalties the sum of \$76,504.21.

2. As against this sum we find that the defendant Benedict Coal Corporation is entitled to a set-off of \$81,017.68.

3. In the cross-action of Benedict Coal Corporation against the defendant Unions our verdict is for *Cross-Plaintiff Benedict Coal Corporation* (Cross-Plaintiff Benedict Coal Corporation, or Cross-Defendants United Mine Workers and United Mine Workers, District 28).

4. (If for the Cross-Plaintiff) Our verdict for the Cross-Plaintiff is for the sum of \$81,017.68.

Civil Action No. 944

JOHN L. LEWIS et al., Trustees,

v.

THE BENEDICT COAL CORPORATION.

Judgment

This case was heretofore heard by the Court on plaintiffs' motion for summary judgment on the counterclaim filed against the plaintiffs, and in accordance with the opinion of the Court heretofore filed herein, it is ordered, adjudged and decreed that the motion of the plaintiff Trustees for summary judgment as to the counterclaim filed against it by the defendant, Benedict Coal Corporation, be and is hereby sustained, and said counterclaim is accordingly dismissed.

It is further ordered, adjudged and decreed that the motion of plaintiff Trustees for summary judgment upon the question of liability as a matter of law on the claim the plaintiff Trustees asserted against the defendant, Benedict Coal Corporation, for unpaid royalties, be and the same is hereby denied.

Thereupon this action came on to be heard on a former day before the Court and a verdict was rendered by the jury in favor of Benedict Coal Corporation in the sum of \$81,017.68 and in favor of John L. Lewis, Charles A. Owen and Josephine Roche in the sum of \$76,504.26, the verdict containing an offset provision.

In accordance with the Court's interpretation of the offset provision in the jury's verdict and as a means of carrying out the intended effect of the verdict, it is ordered that the Benedict Coal Corporation have and recover the sum of \$81,017.68 from United Mine Workers of America and United Mine Workers of America District 28, for which execution may issue.

It is further ordered that said sum of \$81,017.68 be paid into the registry of the Court to be disbursed by the clerk in accordance with instructions appearing below.

It is further ordered that said trustees, in accordance with the verdict rendered in their favor, have and recover of Benedict Coal Corporation the sum of \$76,504.26, said recovery to be had in the manner following: From the aforesaid \$81,017.68 ordered paid into the registry of the Court, that the sum of \$76,504.26 be paid to said Trustees. That the difference between \$76,504.26 and \$81,017.68 be paid to Benedict Coal Corporation.

It is further ordered that one-half of the court costs be paid by Benedict Coal Corporation and one-half by United Mine Workers of America and United Mine Workers of America District 28, for which execution may issue, unless said costs are paid.

Enter:

ROBT. L. TAYLOR,
Judge.

Civil Action No. 944

JOHN L. LEWIS et al., Trustees, *Plaintiffs.*

v.

BENEDICT COAL CORPORATION, *Defendant and Cross-Plaintiff.*

v.

UNITED MINE WORKERS OF AMERICA and UNITED MINE WORKERS OF AMERICA, DISTRICT 28, *Cross-Defendants.*

Order

For the reason that the sum certain owing to plaintiff trustees was rendered uncertain by possibility of set-off

because of violation by the cross-defendants of the contract of which the plaintiffs were third-party beneficiaries, plaintiffs' grounds for allowance of interest are not well taken.

For the further reason that plaintiff trustees, as such beneficiaries, were entitled to benefits from the contract's performance and not from its breach, they have a right to unconditional judgment against Benedict for only such sum as their judgment for royalties exceeds the damages adjudged against the cross-defendants. As no such excess exists, no basis exists for an unconditional judgment against Benedict Coal Corporation in favor of plaintiffs.

It is, accordingly, ordered that cross-defendants' motion for allowance of interest and for an unconditional judgment be, and it hereby is, overruled in both particulars,

Enter:

ROBT. L. TAYLOR,
Judge.

Order

Upon application of the plaintiffs to amend the order of the Court entered on August 16, 1956, overruling the motion of the plaintiffs for the allowance of interest and for unconditional judgment it is ordered that said order is modified by striking therefrom the words "cross-defendants" as said words appear in the first line of the last paragraph of said order and by inserting in said order in lieu thereof the word "plaintiffs".

Enter:

ROBT. L. TAYLOR,
Judge.

Judgment

No. 13,055

(Filed September 26, 1958)

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby set aside for amendment by the District Court in accordance with the views expressed in the opinion.

No. 13,056

(Filed September 26, 1958)

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby set aside and the case is remanded solely for a redetermination in accordance with the views expressed in the opinion, of the amount of damages Benedict Coal Corporation is entitled to recover from United Mine Workers of America and United Mine Workers of America, District 28.

APPENDIX II

Filed Sept. 26, 1958

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 13,055 and 13,056

JOHN L. LEWIS, CHARLES A. OWEN and JOSEPHINE ROCHE,
as Trustees of the United Mine Workers of America
Welfare and Retirement Fund, *Appellants*,

v.

BENEDICT COAL CORPORATION, *Appellee*.

UNITED MINE WORKERS OF AMERICA, and UNITED MINE
WORKERS OF AMERICA, DISTRICT 28, *Appellants*,

v.

BENEDICT COAL CORPORATION, *Appellee*.

Appeal from the United States District Court for the
Eastern District of Tennessee, Northeastern Division.

Decided September 26, 1958

Before SIMONS, Chief Judge, MILLER and STEWART, Cir-
cuit Judges.

STEWART, Circuit Judge. The parties to these consoli-
dated appeals are John L. Lewis, Charles A. Owen, and
Josephine Roche, as Trustees of the United Mine Work-
ers of America Welfare and Retirement Fund; Benedict
Coal Corporation; United Mine Workers of America; and
United Mine Workers of America, District 28. For econ-
omy the parties will be referred to, respectively, as the

Trustees, Benedict, the International Union, and District 28 (and the latter two collectively as the Unions). The United Mine Workers of America Welfare and Retirement Fund will be referred to as the Fund.

This action originated when the Trustees sued Benedict, a coal mine operator, to recover royalties allegedly due the Fund under the National Bituminous Coal Wage Agreement of 1950 and the amendment to said agreement of 1952, with respect to coal mined by Benedict from March, 1950, to July, 1953. The agreements in question were negotiated between the International Union and an employer association representing Benedict and other employers. Under the agreements Benedict was obligated to pay the Fund thirty cents for each ton of coal it produced during part of the period involved and forty cents for each ton it produced during the remainder of the period. Cf. *Lewis v. Quality Coal Corporation*, 243 F. (2d) 769 (7 Cir., 1957). Although Benedict did make some payments to the Fund for coal mined during the period in question, it was stipulated before trial that additional coal had been mined by Benedict upon which royalties in the amount of \$76,504.26 had not been paid.

Benedict's answer to the complaint denied liability upon the ground that the Trustees were beneficiaries of the 1950-52 agreement between Benedict and the International Union that therefore any defenses, counterclaims or set-offs which Benedict had against the International Union were available against the Trustees, and that the International Union had breached the agreements by causing a series of strikes, all of which were in violation of the agreements and two of which were also in violation of the Labor Management Relations Act of 1947; damaging Benedict in excess of the amount sought by the Trustees. Benedict also defended upon the ground that even if the International Union had not been responsible for the strikes,

the misconduct of Benedict's individual employees constituted a defense to the Trustees' action, because these employees were beneficiaries of the Trust.

In addition to its answer filed in response to the Trustees' complaint,¹ Benedict filed a cross-claim against the Unions, claiming damages resulting from the series of strikes between April, 1950, and May, 1953, allegedly caused or ratified by the Unions in violation of the afore-said agreements and, in the case of two of these strikes, also allegedly in violation of the secondary boycott provisions of the Labor Management Relations Act of 1947. The cross-defendant Unions denied any violation on their part of either the agreements or the federal statute.

After a lengthy trial the issues were submitted to a jury, upon instructions that damages to Benedict caused by wrongful acts of its employees would constitute a defense to the Trustees' action, but that Benedict could recover on the cross-claim only upon a finding that wrongful acts of the individual employees had been caused or ratified by the Unions. The jury returned a verdict finding that the Trustees were entitled to recover unpaid royalties in the stipulated amount of \$76,504.26, and that Benedict was entitled to a set-off against this amount of \$81,017.68, the amount in which the jury found in the cross-claim that Benedict had been damaged by the Unions. In accordance with his interpretation of the jury's verdict the district judge entered judgment for Benedict against the Unions for \$81,017.68 and granted execution of the same. He further entered judgment in favor of the Trustees against Benedict in the amount of \$76,504.26, but instead of ordering execution upon this judgment, provided that it should be paid, under the administration of the court, from the

¹ Benedict also filed a counterclaim against the Trustees for the recovery of royalties it had actually paid during the period involved. The counterclaim was denied by the district court in a summary judgment, from which Benedict has not appealed.

proceeds of Benedict's judgment against the Unions.² From this judgment the Trustees have appealed, as have the Unions.

The issues presented by the appeals of the Unions will be dealt with first, since their determination affects the disposition of the Trustees' appeal. The many errors claimed by the Unions relate to three basic issues: (1) Did any or all of the strikes in question violate the agreement of 1950-52 or the Labor Management Relations Act if they were caused by the Unions? (2) If so, was there sufficient evidence to support a finding that either District 28 or the International Union was responsible for any or all of the strikes? (3) If so, were the damages assessed against the Unions excessive?

At the outset the Unions deny liability for damages resulting from the strikes on the ground that the right to strike was preserved in the 1950-52 agreement. It is true that the agreement expressly stated that the "no strike" provisions of the previous contracts were superseded.³ However, the agreement provided in detail the procedure to be followed for the settlement of localized disputes or

² "In accordance with the Court's interpretation of the offset provision in the jury's verdict and as a means of carrying out the intended effect of the verdict, it is ordered that the Benedict Coal Corporation have and recover the sum of \$81,017.68 from United Mine Workers of America and United Mine Workers of America District 28, for which execution may issue.

"It is further ordered that said sum of \$81,017.68 be paid into the registry of the Court to be disbursed by the clerk in accordance with instructions appearing below.

"It is further ordered that said Trustees, in accordance with the verdict rendered in their favor, have and recover of Benedict Coal Corporation the sum of \$76,504.26, said recovery to be had in the manner following: From the aforesaid \$81,017.68 ordered paid into the registry of the Court, that the sum of \$76,504.26 be paid to said Trustees. That the difference between \$76,504.26 and \$81,017.68 be paid to Benedict Coal Corporation."

³ "1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any 'no strike' or 'Penalty' clause or clauses or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void."

grievances.⁴ This procedure was also made exclusive and obligatory by the following provisions:

"3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspension of work and any and all claims, demands, or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry.

"4. The United Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement."

⁴ *"Settlement of Local and District Disputes."*

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

"1. Between the aggrieved party and the mine management.

"2. Through the management of the mine and the Mine Committee.

"3. Through District representatives of the United Mine Worker of America and a commissioner representative (where employed) of the coal company.

"4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

"5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

These sections were revised in the 1952 amendment, but the obligation to resort to the specified procedure was not substantially changed.⁵

Determination of this preliminary issue thus depends upon what effect the agreement to settle all local disputes in accordance with the "Settlement of Local and District Disputes" procedure had upon the right to strike which was expressly preserved in the 1950-52 agreement. The question is not without precedent. The same basic issue was thoroughly considered in *United Constr. Workers v. Haislip Baking Co.*, 223 F. (2d) 873 (4 Cir., 1955); *W. L. Mead, Inc., v. Int'l. Brotherhood of Teamsters*, 126 F. Supp. 466, aff'd, 230 F. (2d) 576 (1 Cir., 1956); and *International Union, United Mine Workers of America v. National Labor Relations Board*, ... F. (2d) ... (D.C. Cir., June 12, 1958). With all respect for the majority view expressed in the latter decision, we agree with the dissenting judge in that case, and with the decisions in the *Haislip* and *Mead* cases, that a strike to settle a dispute which a collective bargaining agreement provides shall be settled by an exclusive and obligatory alternative procedure constitutes a violation of the agreement.

This conclusion does not make meaningless the express abrogation of a no strike clause in the 1950-52 agreement. The right to strike was preserved with respect to all disputes not subject to settlement by other methods made exclusive by the agreement. Moreover, the Unions remained free from liability for spontaneous or "wildcat" strikes. Such spontaneous strikes would be the kind of "stoppages"

⁵ 5-3. The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Local and District Disputes" section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts."

and "suspensions of work" which the agreement made subject to the settlement procedure therein provided.

Viewing the eleven work stoppages in question by these standards, and without stating the facts in detail, we conclude that the evidence was insufficient to show that the stoppage of September, 1950, the "Water Strike," and the stoppage of January 10-11, 1951, the "Collingsworth Strike," were concerted strikes resulting from a labor dispute. These were clearly spontaneous work stoppages, and consequently, they did not constitute violations of the 1950-52 agreement. As to the remaining strikes, we conclude that, except for the "Wage Stabilization Strike" of October, 1952, the evidence was sufficient to support the jury's determination that they resulted from localized labor disputes which were cognizable under the settlement procedure provided by the agreement.⁶ The October, 1952, strike resulted from the refusal of the operators to pay negotiated wage increases in the absence of approval by the Wage Stabilization Board. Being national in scope, this dispute was not under the agreement subject to settlement on the local or district level.

The second basic contention of the International Union and District 28 is that even if the agreement prohibited strikes with respect to local disputes, the strikes in question were not authorized or ratified by the International Union or District 28. It is clear from the record that the district judge was not in error in instructing the jury that District 28 and its agents were agents of the International Union with respect to the activities involved here. The real issue is whether the District's agent did induce the strikes in question. The evidence on this issue was sparse and conflicting, but was sufficient to sustain the jury's finding. Scott, a former employee of Benedict and a member of the local mine committee, testified that prior to the

⁶ This being so, it is unnecessary to consider whether two of these strikes also violated the Labor Management Relations Act of 1947.

first strike and several times thereafter he was told by Seroggs, a field representative of District 28, "I can't tell you boys when to strike. I can't tell you to strike, but when I tell you when you don't get what you want why you boys know what to do." Scott was then permitted to testify as to his understanding of Seroggs' statement. Seroggs unequivocally denied having made this statement. By their finding the jury chose to believe Scott rather than Seroggs. This was their prerogative.

The jury were properly instructed that the Unions were responsible for the acts of their representatives only if the latter were engaged within the scope of their employment or authority, but that actual authorization of specific acts was unnecessary. 29 U. S. C. A., § 185 (e). Moreover, the fact, if it is so, that field representatives of the District lacked actual authority to call strikes is not controlling. These representatives were sent by the District to attempt to settle local disputes at the Benedict mine. The declarations attributed to Seroggs all took place while he was on these missions. The calling of a strike was clearly one way to "settle" a labor dispute, although a way not permitted by the agreement. Consequently the jury were amply justified in finding that Seroggs was acting within the scope of his employment when he made the declarations in question. Compare, *United Mine Workers v. Patton*, 211 F. (2d) 742 (4 Cir., 1954), with *Garmcada Coal Co. v. International Union*, 122 F. Supp. 512 (E. D. Ky., 1954), aff'd, 230 F. (2d) 945 (6 Cir., 1956).

Finally, the Unions contend that even if liability for the strikes is imputable to them, the finding of damages in the amount of \$81,017.68 was excessive and not supported by the evidence. For the reasons which follow we agree with this contention. Since the total verdict for Benedict was in the exact amount demanded in its cross-claim, the jury must have accepted each item of damage and at-

tributed to it the respective amount claimed by Benedict.⁷ Included in the items of loss claimed was \$21,534.85, representing the amount expended on a construction project which was abandoned after construction was interrupted by strikes in February and April, 1952. We agree with the appellants that the district court erred in permitting the jury to consider this item as part of Benedict's damages. Benedict received materials and services for the entire \$21,534.85. If Benedict subsequently decided to abandon the project and to write off the amount spent, it is difficult to see how the Unions thereupon became liable for the loss. Clearly this loss, if it be treated as such, is an item of special damages which could not have been within the contemplation of the parties to the contract. Compare *United Constr. Workers v. Haislip Baking Co.*, *supra*, at 875-76.

We reach a similar conclusion with regard to the loss in the amount of \$6,000 representing the replacement cost of a cable which had been purchased for use in the same construction project. After abandonment of the project the cable was left on the ground and about six months later was destroyed by a forest fire. Benedict's witness testified that the cable was not removed because it was anticipated that the construction would be resumed. Thus the loss of the cable was the direct result of Benedict's own decision, rather than the appellants' breach of contract. Moreover, the loss is so indirectly related to the strikes that it was clearly beyond the contemplation of the parties to the agreement.

⁷ The damages alleged by Benedict consisted of the following items:

(1) An increase in the cost of production of coal mined during each of the eleven months in which strikes occurred, aggregating	\$49,850.33
(2) Loss resulting from the abandonment of a construction project	21,534.85
(3) Loss resulting from the destruction of a cable by forest fire	6,000.00
(4) Loss of income incurred because of inability to process coal for other producers during the strikes	3,632.50
Total	\$81,017.68

In addition, we agree with the Unions' contention that the formula used by Benedict to calculate the amount of loss attributable to each strike, and apparently accepted by the jury, was clearly erroneous. The formula as it appears from the exhibits and testimony involved a determination of the amount by which the cost of coal produced during months in which strikes occurred was increased because of the curtailment of production and a resulting higher ratio of fixed costs to tons of coal produced. The increase in fixed costs per ton was multiplied by the number of tons which would have been produced during the month if no interruption had occurred and the resulting amount was claimed as the loss sustained because of the strike. This formula was erroneous because it measured only increased costs rather than actual profit or loss. Benedict's own records indicated that even if production had been uninterrupted and all coal sold at the price actually received each month, a substantial loss would nevertheless have been sustained. Only to the extent that the loss was aggravated by the strikes is Benedict entitled to recovery from the Unions. Upon the present record, even if Benedict's figures are accepted as the basis for the computation, the eight strikes which could properly have been found to be in violation of the contract could have increased Benedict's actual losses by not more than \$15,866.54.

Date	Actual tonnage	Actual cost per ton	Average sales price per ton	Actual sales	Actual costs	Actual loss or gain
Apr. '50	20,468.5	46.397	45.008	\$114,787.31	\$150,936.92	\$ 16,151.61
Jul. '51	11,828	5.264	5.561	65,803.97	62,259.35	3,544.62
Oct. '51	13,508.5	6.110	5.705	77,067.94	82,532.43	5,464.49
Nov. '51	14,271.4	5.729	5.798	82,715.85	81,754.47	961.38
Feb. '52	16,023.6	6.139	5.492	88,064.28	98,283.93	10,219.65
Apr. '52	16,031.4	6.083	5.370	89,177.55	101,164.67	11,987.12
Aug. '52	8,460	5.907	5.315	44,963.39	49,972.94	5,010.55
Mar. '53	6,144.4	7.522	5.555	33,955.73	45,876.66	11,920.93

Because of these errors affecting the amount of damages Benedict was entitled to recover from the Unions, the judgment must be set aside and the case remanded for a new trial upon that issue. By reason of what we have said on this review it is possible that additional or different evidence may be introduced upon the issue of damages at a retrial. Accordingly, nothing that has been stated here should be understood as fixing a maximum allowable recovery in a second trial.

We turn now to the separate issues raised by the Trustees' appeal. The jury found that Benedict was liable to the Trustees for unpaid royalties in the amount of \$76,504.26. Determining, however, that a set off of \$81,017.68 was intended, the district court ordered that the Trustees should recover only after Benedict's judgment against the Unions was paid. Accordingly, Benedict was granted execution of its judgment with instructions that the sum be paid into the registry of the court. From this sum the Trustees were to receive \$76,504.26 and the balance was to go to Benedict. Because the Trustees' judgment was conditional, neither execution nor interest was granted. It is the Trustees' contention that this disposition was erroneous and that they are entitled to an unconditional judgment with interest for the \$76,504.26 representing unpaid royalties.

Date	Projected tonnage	Pro- jected cost per ton	Ave- rage sales price per ton	Projected sales	Projected costs	Projected loss or gain
Apr—50	23,044	\$6.24	\$5.608	\$129,330.72	\$143,794.56	-14,463.84
Jul—51	13,516	5.142	5.563	75,189.51	69,990.24	5,699.24
Oct—51	18,272	5.746	5.765	104,241.76	104,996.41	-749.15
Nov—51	16,053	5.507	5.798	93,075.29	88,405.57	4,671.42
Feb—52	17,035	6.008	5.492	93,551.42	102,951.8	-9,099.66
Apr—52	18,047	5.953	5.370	100,234.39	111,024.24	-10,789.85
Aug—52	9,068	5.721	5.315	51,385.42	55,310.63	-3,925.24
May—53	10,186	6.079	5.557	56,603.60	68,062.29	-11,458.69

The heart of the Trustees' appeal lies in their contention that it was error for the district court to construe the 1950-52 agreement as making the Trustees third party beneficiaries of Benedict's promises. If the district court was correct, then defenses available against the unions were also available to Benedict as set-offs against the Trustees. In addition to permitting Benedict to set off damages resulting from breaches attributable to the Unions, the district court held that acts of individual employees of Benedict which caused damage to Benedict could be the basis for set-offs against the Trustees, even if the acts were not imputable to the Unions.

The Trustees assert that under the 1950-52 contract, title to the royalties passed to the Trustees immediately upon production of the coal. Consequently they argue that their cause of action was one to recover property held in constructive trust for them by the settlor, Benedict. If correct in these contentions, the Trustees would be immune from set-offs or claims which Benedict might have against the Unions or the individual employees.

The provision of the agreement specifically relied upon by the Trustees states: "Title to all moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust. . . ." Acceptance of the Trustees' interpretation would require the conclusion that the parties intended that the royalties become "due and owing" as soon as the coal left the ground. To thus construe the royalty provisions as being independent of the obligations assumed by the Unions would, however, be inconsistent with the agreement considered as an entirety. The 1950-52 agreement specifically provided: "This Agreement is an integrated instrument and its respective provisions are interdependent. . . ." Further, the provision requiring that the parties resort to the specified procedure

for the settlement of local disputes is stated to be "part of the consideration of this contract." Hence we conclude that the obligation to make payments to the Trustees was dependent upon performance by the Unions of their obligations, and consequently that the district court was correct in ruling that the Trustees were third party beneficiaries of the contract and subject to the defenses arising from breaches by the Unions.

We cannot agree, however, that Benedict was entitled to a set-off against the Trustees for losses resulting from acts committed by individual employees not imputable to District 28 or the International Union. The individual employees were not parties to the agreement, so their acts clearly could not amount to a breach unless the acts were imputable to a contracting party. Benedict's contention, which was accepted by the district court, was that the individual members were beneficiaries of the Fund and that since the royalty payments were for their ultimate benefit, their misconduct would *pro tanto* relieve Benedict of the obligation to make the royalty payments.

This theory overlooks the nature of the Fund and its relationship to the individual employees. Though *sui generis*, union welfare funds created under the authority of 29 U. S. C. A., § 186 (c), are similar in some respects to charitable trusts. See *Van Horn v. Lewis*, 79 F. Supp. 541, 545 (D.D.C., 1948); Cf. *Hobbs v. Lewis*, 159 F. Supp. 282 (D.D.C., 1958). As in a true charitable trust, the actual beneficiaries of this fund are not ascertainable. Present employees who are potential beneficiaries may have an "interest" sufficient to enforce compliance with statutory requirements for administration of the fund, see *Wilkins v. De Koning*, 152 F. Supp. 306 (E. D. N. Y., 1957), but it is clear that the agreement did not contemplate vesting the employees with a present "interest" in the trust *res* so as to warrant a set-off in favor of the settlor.

This was made clear by the agreement, which provided that "no benefits or moneys payable from this fund shall

be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void. The moneys to be paid into said fund shall not constitute or be deemed wages due to the individual mine worker, *nor shall said moneys in any manner be liable for or subject to the debts, contracts, liabilities, or torts of the parties entitled to such money; i. e., the beneficiaries of said Trust under the terms of this Agreement*" [emphasis added]. These restrictions upon dispersal of the trust funds were applicable whether the party seeking to assert a claim was a third party or the settlor.

The Trustees, however, were not prejudiced by the error of the district court on this phase of the case. On the cross-claim the jury found that all of the acts in question were in fact caused or ratified by the Unions. The jury's finding on the set-off must also, therefore, have been on the basis of acts attributable to the Unions rather than to unauthorized conduct of individual employees.

Since the Trustees were properly determined to be third party beneficiaries and subject to defenses arising from breaches by the Unions, the district court correctly concluded that the judgment for the Trustees, to the extent that it was subject to a set-off, was conditional and not entitled to execution and interest. However, it is evident for the reasons discussed earlier that the losses for which Benedict may be compensated will be less than the amount of the Trustees' judgment, and the Trustees will be entitled to interest and execution on that part of the judgment in their favor which is in excess of the allowable set-off.

The judgments are set aside. Case No. 13,056 is remanded solely for a redetermination, in accordance with the views expressed in this opinion, of the amount of damages Benedict is entitled to recover from the Unions. The

judgment in favor of the Trustees will then be amended by the district court to allow execution and interest on that part of the said judgment which is in excess of the set-off in favor of Benedict as so redetermined.

Nos. 13,055-56.

Miller, Circuit Judge, concurring in part and dissenting in part. I concur in the rulings of the majority opinion, except with respect to some of them involving the question of damages.

The majority opinion holds that, as a matter of law, liability for damages on the part of the unions could exist only in eight of the eleven work stoppages in issue, and that it was error to permit the jury to include in its verdict damages alleged to have been caused by the remaining three work stoppages, referred to in the record as the "Water Strike," the "Collingsworth Strike," and the "Wage Stabilization Board Strike." I am of the opinion that it was proper for the jury to consider what damage, if any, was caused by each one of the eleven work stoppages, instead of only eight.

With respect to the "Water Strike" and the "Collingsworth Strike" the majority ruling is that they were spontaneous work stoppages, rather than concerted strikes resulting from a labor dispute, and consequently did not constitute violations of the 1950-52 Agreement. There was evidence that Field Representative Seroggs of District 28 told members of the local, "Boys, I can't tell you. * * * I can't tell you boys when to strike. I can't come out and tell you to strike, but when I tell you when you don't get what you want why you boys know what to do then," and that this was understood by those who knew the language to mean, "Well, we knowed, when he told us that we knowed to strike." Section 4 of the 1950 agreement provided that the United Mine Workers would exercise their best efforts through available disciplinary measures to

prevent stoppages of work by strike pending adjustment of grievances in the manner provided by the agreement. There were two or three strikes over water without disciplinary action being taken by the unions. There was evidence that Scroggs supported the position of the strikers in the "Collingsworth Strike." In my opinion, this evidence was sufficient to take to the jury the factual issue of whether these strikes were of the "wildcat" type for which the unions were not responsible or were work stoppages either instigated or ratified by the union representatives in violation of the Agreement.

With respect to the "Wage Stabilization Board Strike" in October, 1952, it is true that the issue involved was national in scope and under the Agreement was not required to be settled by the machinery provided in the "Settlement of Local and District Disputes" section. But the amended agreement, effective October 1, 1952, also provided: "The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract" and that in the case of disputes national in character "the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry," it being the purpose of this provision to settle such disputes by collective bargaining without recourse to the courts. The 1952 amendment provided for a per diem increase for the mine workers of \$1.90 a day. On October 18, 1952, the Wage Stabilization Board refused to approve more than \$1.50 of this increase. Miners throughout the country went on strike, including miners of Benedict. Under date of October 21, 1952, the President of the United Mine Workers replied to a letter received from the President of the National Bituminous Coal Operators Association, in which he wrote in part as follows: "You assert that many miners are not working. You also know that they are outraged by the attempt of the N A M ruffians to fleck milk money from their purse. They are acting as individuals. They are exercising their

rights as individuals and freeborn Americans. They have not sought nor been given advice or suggestions by their Union or this writer. We have a contract. We expect your compliance with its provisions. Miners will work when you honor its provisions. If you do not like the contemptible action of the N A M labor baiters and the little Harvard professor and his quavering trio, appeal and ask for review and reversal. You are the sole petitioner and plaintiff." I do not believe that this Court can say as a matter of law that this action of the Union was not a violation of its contract obligation to "settle such disputes by free collective bargaining as heretofore practiced in the industry." The statutory concept of free collective bargaining is "the mutual obligation of the employer and the representatives of the employees to meet at reasonable times and confer in *good faith* with respect to wages, hours and other terms and conditions of employment. * * *" (Emphasis added). Sect. 158 (d), Title 29, U. S. Code, *N. L. R. B. v. American National Insurance Co.*, 343 U. S. 395, 409. Good faith requires an unpretending, sincere intention and effort to arrive at an agreement; it is a state of mind which can be resolved only through an application of the facts in each particular case. *N. L. R. B. v. Stanislaus Implement and Hardware Co.*, 226 F. (2) 377, 380, C. A. 9th. The Union's action in this instance could reasonably be construed as an approval of the action of the miners together with a recommendation to them that the strike continue irrespective of its purpose to compel Benedict to pay wages which would have been a violation of law on its part to pay. Although a labor union has the general right to strike for the advancement of its own economic interests, Section 163, Title 29, U. S. Code, such right does not include the right to strike to accomplish an unlawful purpose or to force an employer to act in violation of the laws or established policies of the United States Government. *United States v. Chattanooga Chapter, etc.*, 116 Fed. Supp. 509, 511, E. D. Tenn.; *N. L.*

R. B. v. Aladdin Industries, 125 F. (2) 377, 380-381, C. A. 7th, cert. denied 316 U. S. 706; *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 256. Whether the action of the Union complied with its contract obligation to "maintain the integrity of this contract" and constituted a good faith exercise of "free collective bargaining," as also required by its contract, is a question which in my opinion should be decided by the jury, rather than by this Court. *Allied Equipment Co. v. Weber Engineered Products*, 237 F. (2) 879, 883, C. A. 4th.

I concur in the ruling of the majority opinion that it was error to permit the jury to consider the claimed loss of \$6,000.00 representing the replacement cost of a cable which was destroyed by a forest fire, but I am not in accord with its holding on the question of the amount of damages caused by the other work stoppages considered by it.

With respect to the claimed loss of \$21,534.85 resulting from the abandonment of a construction project, the evidence was that that amount was the cost of the labor and material which went into the incompleeted project. The majority opinion, in rejecting this item of damage as a matter of law, treats the abandonment of the project as a voluntary act on the part of Benedict, holding that Benedict was not damaged in that it received materials and services for the entire \$21,534.85 which it expended. Such rule is not applicable, however, if the abandonment of the project was not a voluntary act on the part of Benedict. *Harris v. The Cecil N. Bean*, 197 F. (2) 919, 921-922, C. A. 2nd; Restatement, Contracts, Sect. 357 (1) (a). If the unions were responsible for the abandonment of the project, Benedict would not be chargeable with the cost of the materials and services which went into the project, but rather only with the amount of the benefit which it received from such materials and services. *Morton v. Roanoke City Mills, Inc.*, 45 F. (2) 545, 547, C. A. 4th; *In re*:

Irving-Austin Bldg. Corporation, 100 F. (2) 574, 578, C. A. 7th; *Schwasnick v. Blandin*, 65 F. (2) 354, 357, C. A. 2nd; Restatement, Contracts, Sect. 357 (3). Whether the abandonment of the project was voluntary on the part of Benedict was a factual issue in the case. There was substantial evidence on the part of Benedict that the labor trouble and pressure became so great the contractor was forced to quit, which in my opinion was sufficient to take such factual issue to the jury. There was also evidence that Benedict did not get a dollar's worth of use out of the work, that the work had not progressed to the point where it could have been used for anything, and that the investment was a complete loss. What benefit, if any, Benedict received from the partial performance of the contract, likewise seems to be a jury question.

With respect to other work stoppages, Benedict introduced evidence showing the difference between the cost per ton of the coal actually mined and the decreased cost per ton if production had not been suspended by the strikes. This increase in fixed costs per ton was multiplied by the number of tons which would have been produced during the month if production had not been suspended during the strikes, and the resulting amount claimed as the loss sustained because of the strike. I agree with the majority ruling that this formula did not correctly show the damage. It included the increased cost of production on tonnage that was not mined. With respect to tonnage that was not mined, Benedict's damage was the loss of profits which would have resulted if such tonnage had been produced and sold. Increased cost of production is only one element affecting profits. *United States v. Griffith, etc.*, 210 F. (2) 71, 14, C. A. 10th. It was not shown that this tonnage, if produced, would have been sold at a profit. It is contended that it would have been sold at a loss if it had been mined, in which event Benedict was not damaged. With respect to the tonnage that was not mined, the question of what damage, if any, was sus-

tained by Benedict by reason thereof, should have been submitted to the jury under instructions applicable to lost profits. *Yates v. Whigel Coke Co.*, 221 F. 603, 607, C. A. 6th; *Roseland v. Phister Mfg. Co.*, 125 F. (2) 417, 420, C. A. 7th. See: *Union Cotton Co. v. Bondurant*, 188 Ky. 319, 323-324.

With respect to the coal that was mined by Benedict, Benedict's damage was the amount by which its profits were reduced by the strike, or if the coal was produced at a loss, the amount by which the loss was aggravated by the strike. Increased cost of production caused by the strike was a proper element for the consideration of the jury.

APPENDIX III

29 USC, Section 185

*Suits by and against labor organizations—
Venue, amount and citizenship*

“(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

“(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.”

29 USC, Section 186

Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

“(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

“(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

“(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of em-

employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

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Supreme Court of the United States

OCTOBER TERM, 1958

No. ~~100~~ 19

UNITED MINE WORKERS OF AMERICA, and UNITED MINE
WORKERS OF AMERICA, DISTRICT 28, *Petitioners,*

v.

BENEDICT COAL CORPORATION.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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Supreme Court of the United States

OCTOBER TERM, 1958

No.

UNITED MINE WORKERS OF AMERICA, and UNITED MINE
WORKERS OF AMERICA, DISTRICT 28, *Petitioners*,

v.

BENEDICT COAL CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Petitioners, United Mine Workers of America and United Mine Workers of America, District 28 (herein called "UMW" and "District 28" or "District", respectively), and each of them, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit¹ entered September 26, 1958 in Case No. 13,056, styled United Mine Workers of America and United Mine Workers of America, District 28, Appellants, v. Benedict Coal Corporation,² Appellee, wherein the Sixth Circuit set

¹ Herein the United States Court of Appeals for the Sixth Circuit is referred to as either the "Court of Appeals" or "Sixth Circuit".

² Herein Benedict Coal Corporation will be referred to as "Benedict".

aside a judgment entered by the United States District Court for the Eastern District of Tennessee, Northeastern Division,³ in favor of said coal corporation and against petitioners for \$81,017.68 but remanded the case for a new trial on the issue of damages alone (A. 14a, 21a).⁴

A certified appendix record in said case, together with the proceedings in the Sixth Circuit, is furnished herewith, in accordance with the Rules of this Court.

OPINION BELOW

The Sixth Circuit's opinion appears in the Appendix hereto at page 1a et seq.; in the certified record; and it is reported in 259 F. 2d 346 (Adv. Op. November 17, 1958).

JURISDICTION

The Court of Appeals' judgment reversing the trial court's judgment with directions, as aforesaid, was entered September 26, 1958 (A: 21a). The jurisdiction of this Court is invoked under 28 U.S.C., Sections 1254(1) and 2101 (c).

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The basis for Federal jurisdiction in the United States District Court of the original complaint was diversity of citizenship between the plaintiffs and the defendant and the amount involved.

³ Herein the United States District Court for the Eastern District of Tennessee, Northeastern Division will be referred to as the "trial court" or "district court".

⁴ Herein the abbreviation "R." refers to the printed certified record under Rule 20 of said Court, filed in the Supreme Court of the United States, while the abbreviation "A." refers to the Appendix to the instant Petition.

The cross-claim was filed under the provisions of Title 29, U.S.C. Secs. 185 and 187. The basis for Federal jurisdiction thereof was diversity of citizenship between the cross-claimant and cross-claim defendants and the amount involved, in addition to said statutes.

QUESTIONS PRESENTED

1. Where (1) the settlement of disputes section of collective bargaining agreements antedating 1950 provided that Mine Workers shall not engage in a work stoppage pending settlement of disputes under grievance machinery procedures and such agreements contained other "no strike" clauses, and (2) under the Labor Management Relations Act, 1947,^{4a} the right to strike became a bargainable subject, and (3) in 1950 UMW and coal operators signatories to the National Bituminous Coal Wage Agreement of 1950, deleted such clauses therefrom and expressly covenanted that the "no strike" clauses in prior agreements were rescinded and made null and void, and (4) signatories to such 1950 Agreement covenanted that stoppages, as well as disputes, shall be settled exclusively under grievance machinery procedures set forth in such contract, is a stoppage of work pending settlement of a dispute cognizable under the grievance machinery procedures proscribed thereby and a violation of the 1950 Agreement so as to subject UMW and District 28 to damage actions under the Act's Section 301?

2. Where (1) the settlement of disputes section of collective bargaining agreements antedating 1950 provided that Mine Workers shall not engage in a

^{4a} The Labor Management Relations Act, 1947, is herein called the "Act."

work stoppage pending settlement of disputes under grievance machinery procedures and such agreements contained other "no strike" clauses, and (2) under the Act the right to strike became a bargainable subject, and (3) in 1950 UMW and coal operators signatories to said 1950 Agreement deleted such clauses therefrom and expressly covenanted that the "no strike" clauses in prior agreements were rescinded and made null and void, and (4) signatories to the 1950 Agreement covenanted that stoppages, as well as disputes, shall be settled exclusively under grievance machinery procedures set forth in such contract, and (5) signatories to the 1952 Agreement carried forward therein the 1950 Agreement's express covenants that the "no strike" clauses in prior agreements were rescinded and made null and void and deleted both the provision contained in the 1950 Agreement that stoppages shall be settled under the grievance machinery procedures and the provision that settlement by such procedures shall be the exclusive method, is a stoppage of work pending settlement of disputes which are cognizable under the grievance procedures proscribed by the 1952 Agreement so as to constitute a violation thereof and to subject UMW and District 28 to damage actions under the Act's Section 301.

3. Is the testimony of one employee witness that a District field representative prior to a strike and several times thereafter told him, "I can't tell you to strike, but when I tell you when you don't get what you want why you boys know what to do", which the witness testified he understood to mean "to strike", and the witness is unable to fix the time of such utterances, and such statement was not transmitted by him to other employees who engaged in strike activity, and the witness admitted he called no strike activity him-

self, sufficient to warrant a jury finding, and the District Court's and Sixth Circuit's approval thereof, that the field representative induced the strike?

4. Even if such testimony suffices to sustain the conclusion that the field representative induced the strikes, was the field representative acting within the scope of his authority in making such statement so as to impute responsibility therefor to District 28 under Sections 301(b) and 301(e) of the Act for strikes resulting from disputes cognizable under the grievance procedures of collective bargaining agreements?

5. In the absence of proof that UMW authorized, participated in or ratified work stoppages allegedly induced by an agent of District 28, is UMW liable or responsible therefor on the theory that, as a matter of law, District 28 and its agents are likewise agents of UMW under Section 301(b) and 301(e) of the Act with respect to such stoppages and that strike activity of such agents may be imputed to UMW?

6. Under applicable law, is there sufficient evidence to support the jury's determination, and approval thereof by the District Court and the Sixth Circuit, that eight of the alleged strikes resulted from localized labor disputes which were cognizable under the settlement procedures of the several Agreements in effect at the times of such strikes; that UMW and District 28 violated the provisions of such Agreements; that representatives of UMW and District 28 with authority induced such strikes; and that UMW and District 28 are responsible for each of such strikes?

7. Where one employee witness testified that a District field representative told him, "When we didn't get what we wanted, we knowed what to do", and was

permitted to state, over objections, that he understood such statement to mean "to strike", was it prejudicial and reversible error for the trial court to permit such witness to testify what his understanding was of such statement?

8. Under applicable law, was there sufficient evidence to warrant the trial court's submitting to the jury the question of whether UMW and District 28 violated, and the jury's finding that they had violated, Section 303 of the Act in connection with the M. M. Campbell strikes?

9. Under applicable law, was there sufficient evidence to warrant the trial court's submitting to the jury the question of whether UMW and District 28 violated, and the jury's finding that they had violated, Section 303 of the Act in connection with the Big Mountain Coal Company strike?

STATUTES INVOLVED

The pertinent statutory provisions involved are Sections 301(a), (b) and (c), 303 and 13 of the Labor Management Relations Act, 1947 [29 U.S.C., Section 185(a), (b) and (c), Section 187 and Section 163] and appear in the Appendix hereto" (p. 25a et seq.).

STATEMENT OF THE CASE

1. The Pleadings, Trial Proceedings and the Sixth Circuit's Judgment

Trustees of the United Mine Workers of America Welfare and Retirement Fund, by complaint filed in the trial court, sought judgment against Benedict for

³ The Trustees' action was styled John L. Lewis, Charles A. Owen and Josephine Roche, as Trustees of the United Mine Workers of

unpaid royalties on coal mined by Benedict which were due and owing under the National Bituminous Coal Wage Agreement of 1950 and as amended in 1951 and 1952.⁶

In its answer, Benedict denied liability to the Trustees, asserted *inter alia* that UMW had breached its agreement with Benedict, and, pursuant to Sections 301 and 303 (29 USCA 185 and 187) of the Act, as cross-complainant filed its cross-claim⁷ against UMW and District 28 for \$148,078.85 of compensatory damages (R. 64a) upon allegations, denied by UMW and District 28 in its answer and amended answer (R. 46a, 72a), that said unions had breached the Agreements effective during 1950-1953 by calling "a number of unlawful strikes" at Benedict mines during that period, during which and previous to such strikes Union agents refused to arbitrate matters in dispute and to follow the contractual provisions for adjustments of disputes and directed, authorized or ratified strikes by Union members and Benedict employees (R. 43a); that UMW and District 28 agents and employees called a strike at Benedict mines

America Welfare and Retirement Fund v. Benedict Coal Corporation in the trial court. Judgment rendered therein was appealed by the Trustees and was docketed as No. 13,055 in the Sixth Circuit. Substitution of Henry G. Schmidt as successor Trustee to Charles A. Owen was granted by the Sixth Circuit, October 16, 1958.

⁶ The National Bituminous Coal Wage Agreement of 1950 (R. 88a) will be called the "1950 Agreement", that Agreement as amended January 18, 1951 (R. 118a), the "1951 Agreement", and the 1950 Agreement as amended September 29, 1952 (R. 108a) the "1952 Agreement".

⁷ The original cross-claim is found beginning at page 25a of the printed record and amendments thereto begin at pages 37a, 41a, and 61a thereof.

to force employees of Big Mountain Coal Company, a Benedict lessee, to join "the said Union and . . . the Benedict local" (R. 31a), which strike, called, incited and encouraged by said agents, was unlawful because its purpose was to force Benedict to cease doing business with Big Mountain, to force Big Mountain's employees to become dues-paying members against their will and to force Big Mountain to recognize and bargain with UMW and District 28, "which had not been certified according to law" (R. 32a); and that UMW and District 28 agents "threatened and harassed the employees of M. M. Campbell", a contractor engaged by Benedict on a construction project and whose employees were neither union members nor represented by UMW, whose agents called strikes at Benedict mines to force Campbell to sign an UMW contract, to employ miners cut off from Benedict's mines and "to cut dues of certain of his employees", with the unions, their agents and members failing and refusing "to use the methods" in the contracts between UMW and Benedict for "the adjustment and settlement of" disputes and "to arbitrate the matters in dispute" and "to prevent the said strikes by the use of proper disciplinary measures" in violation of the Labor Management Relations Act and said contracts, and as a result of which strikes "and of other harassment", Campbell was forced to abandon the project (R. 62a, 63a).

In their answer and amendments thereto, UMW and District 28, denying the material allegations of the cross-complaint, alleged upon advice that the strikes had been "brought about largely, if not entirely, because of the arbitrary and unreasonable

conduct" of Benedict and that Benedict had breached the bargaining contracts and disregarded its obligations to its employees by failing to pay, or being grossly delinquent in the payment of vacation pay, in payments to the Fund, and in other ways (R. 46a-53a, 72a).

Upon jury trial, a verdict of \$81,017.68 against UMW and District 28 was rendered (R. 74a). A verdict against Benedict in favor of the Trustee was rendered for \$76,504.21⁸ (R. 74a). The trial court entered judgment in said amount in Benedict's favor against both UMW and District 28, "for which execution may issue"; and ordered that said sum be paid into the Court's registry, with directions to the clerk that of said amount the sum of \$76,504.26 be paid to the Trustees and that the difference be paid to Benedict (R. 76a). One-half of costs were ordered to be paid by Benedict, the other half by UMW and District 28, "for which execution may issue, unless said costs are paid" (R. 76a). Petitioners noted their exceptions to the trial court's jury charge (R. 738a-42a). Motion for a new trial was denied petitioners (R. 77a, 86a).⁹

Upon appeal, the Sixth Circuit, by judgment entered September 26, 1958, set aside the trial court's judgment because of errors "affecting the amount of

⁸ The verdict for \$76,504.21 was placed in the judgment (A. 76a) as \$76,504.26.

⁹ Petitioners' assigned grounds to set aside the jury verdict, to vacate judgment entered thereon, and for a new trial appear in the printed record beginning on page 77a.

damages Benedict was entitled to recover from the Unions" and remanded the case "solely for a redetermination . . . of the amount of damages" Benedict is entitled to recover against Petitioners (A. 21a).

On the issue of liability, the Sixth Circuit regarded the basic issues to be (1) Did any or all of the strikes in question violate the agreement of 1950-52¹⁰ if they were caused by the Unions? (2) If so, was there sufficient evidence to support a finding that either District 28 or the International Union was responsible for any or all of the strikes? Like the trial court, the Sixth Circuit answered such issues in the affirmative. While, as indicated, the Sixth Circuit has remanded the case for retrial upon the issue of damages, review by writ of certiorari at this posture of the case is appropriate, since the element of damages of necessity is predicated upon issues of liability which petitioners assert were erroneously decided by both the Sixth Circuit and the trial court. Cf. *United States v. General Motors Corporation*, 323 U. S. 373, 377; *Land v. Dollar*, 330 U. S. 731, 734; *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 685; *U. S. v. Gulf Refining Co.*, 268 U. S. 542, 545.

¹⁰ Having determined—erroneously, petitioners assert—that certain strikes were "cognizable under the settlement procedures", the Sixth Circuit declared it "unnecessary to consider whether two of these strikes also violated the Labor Management Relations Act of 1947" (A. 7a).

2. The Facts

a. As to Whether the Strikes Were Violative of the Collective Bargaining Agreements

Benedict, a coal producer in Lee County, Virginia, was a signatory to the 1950, 1951 and 1952 Agreements, effective during the period of March 5, 1950-June, 1953, when the strikes involved allegedly occurred. Benedict's assertion that such strikes violated the Agreements necessitates examination of pertinent provisions thereof.

THE 1950 AGREEMENT

By specific recitals in the 1950 Agreement, terms of certain antecedent agreements in the bituminous coal industry were carried forward, subject to the terms and conditions of the 1950 Agreement (R. 88a).¹¹ These antecedent agreements mandated that "Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute" (R. 124a);¹² that "A strike or stoppage of work on the part of the Mine Workers shall be a violation of this Agreement" (R.

¹¹ These were:

- (1) the Appalachian Joint Wage Agreement of 1941 (R. 122a),
- (2) the Supplemental Six-Day Work Week Agreement,
- (3) the National Bituminous Coal Wage Agreement of 1945 (R. 120a), and
- (4) all various District Agreements based upon the afore-said basic Agreements as such district agreements existed on March 31, 1946—but all "subject to the terms and conditions of the 1950 Agreement and as amended, modified and supplemented" thereby.

¹² Appalachian Joint Wage Agreement of 1941 (R. 122a, 124a).

125a);¹³ and that "For the duration of this Agreement no strikes shall be called or maintained hereunder."¹⁴

The 1947 Agreement (R. 126a), executed after enactment of the Taft-Hartley Act, expressly "reincided, cancelled, abrogated and made null and void" the "no strike", "penalty" and "Illegal Suspension of Work" clauses of prior Agreements (R. 127a, 129a); UMW members were to work when "willing and able", and stoppages, in addition to disputes, were to be settled exclusively by grievance machinery procedures (R. 129a).

The 1950 Agreement continued repeal of the "no-strike" clauses (R. 106a). Moreover, whereas the 1941 Agreement's "Settlement of Disputes" section mandated that pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute (R. 124a), and "there shall be no suspension of work on account of" disputes, that provision was deleted in the 1947 Agreement (R. 126a) and no proscription against stoppages is contained in the corresponding disputes section of the 1950 Agreement¹⁵ which set forth the settlement steps as (1) between the aggrieved party and mine management, (2) through mine management and the mine committee, (3) through district

¹³ Appalachian Joint Wage Agreement of 1941 (R. 125a).

¹⁴ The 1945 Agreement appears, in part, in the printed record at pages 120a-121a, but the quoted language in the text above found in Section 13 of that Agreement was inadvertently omitted.

¹⁵ The 1950 Agreement's "Settlement of Local and District Disputes" section reads in part thus (R. 104a):

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately: . . ."

representatives and a commission representative (where employed) of the coal company, (4) by a board of two designated "by the Mine Workers and two by the Operators", and (5) reference to an umpire (R. 104a). *This manifestly pertinent change was completely ignored by the Sixth Circuit.* The latter agreement recognizing, not only the right to strike, provided that stoppages, in addition to disputes, were to be settled exclusively by procedures under the grievance machinery (R. 106a); and UMW and the Operators affirmed "their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement" (R. 106a). It contained no express waiver or limitation of the right to strike.

THE 1951 AGREEMENT AND DIRECTIVE FROM UMW

The foregoing provisions of the 1950 Agreement were carried forward into the 1951 Agreement, which became effective February 1, 1951.

On October 24, 1951 UMW issued a directive "to all Members, Committeemen and Officers of all Local Unions", UMW (R. 499a-501a), against unauthorized strikes, declaring them to be in conflict with its Constitution and policies.

THE 1952 AGREEMENT

In negotiating the 1952 Agreement, UMW preserved the deletion and repeal of the "no-strike" and kindred clauses. The 1950 Agreement's covenant that "stoppages" be settled "exclusively" by the grievance procedures of the contract was expunged. Likewise,

the 1952 Agreement released UMW from the 1950 "best efforts" obligation by striking the "best efforts" clause. Instead the 1952 Agreement provided that (R. 113a):

"3. The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts."

Like the 1950 Agreement, the 1952 Agreement contained no waiver or limitation of the right to engage in a work stoppage.

THE SIXTH CIRCUIT'S CONCLUSION

Despite these pertinent amendments made in the 1952 Agreement, the Sixth Circuit professed that "the obligation to resort to the specified procedure was not substantially changed" (A. 6a).

In the trial court, in exceptions to the jury charge, in motions for directed verdict (R. 713a) and motion for new trial (R. 738a-42a, 77a), petitioners, asserted that the strikes were not in violation of the Agreements, which the trial court rejected. Though the Sixth Circuit agreed that "the Agreement expressly stated that the 'no strike' provisions of the

previous contracts were superseded" and that "the right to strike . . . was expressly preserved in the 1950-52 agreement" (A. 6a), it declared that determination of whether the strikes violated such agreement "depends upon what effect the agreement to settle all local disputes in accordance with the 'Settlement of Local and District Disputes' procedure had upon the right to strike", and it concluded that "a strike to settle a dispute which a collective bargaining agreement provides shall be settled by an exclusive and obligatory alternative procedure constitutes a violation of the agreement". It reasoned that its conclusion "does not make meaningless the express abrogation of a no strike clause in the 1950-52 Agreement"; that the "right to strike was preserved with respect to all disputes not subject to settlement by other methods made exclusive by the agreement"; and though professing that "the Unions remained free from liability for spontaneous or 'wildcat' strikes", defined by that Court as "the kind of 'stoppages' and 'suspension of work' which the agreement made subject to the settlement procedure therein provided" (A. 6a-7a), and although the Sixth Circuit concluded that the strikes "resulted from localized labor disputes which were cognizable under the settlement procedure" (A. 7a), wholly inconsistent therewith it nevertheless placed its imprimatur upon the trial court's holding that UMW and District 28 were liable for strike activity.

b. Issue Relating to Whether UMW and District 28, or Either, Was Responsible for the Strikes.

Benedict grounded UMW and District 28's responsibility upon eleven alleged strikes. As to two, the Sixth Circuit held the evidence insufficient to show the stoppages "were concerted strikes resulting from a

labor dispute"; that they were "clearly spontaneous" and therefore "did not constitute violations of the 1950-52 Agreement" (A. 7a).¹⁶ It likewise excluded a third strike because of its being "national in scope. (the) dispute was not under the agreement subject to settlement on the local or district level" (A. 7a).¹⁷ As to the remaining eight strikes, the Sixth Circuit held "the evidence was sufficient to support the jury's determination that they resulted from localized labor disputes which were cognizable under the settlement procedure provided by the agreement" (A. 7a). The facts relating to these eight strikes are set forth below.¹⁸ Neither UMW nor District 28 authorized, called, participated in or ratified any of them. In each strike situation, the miners voluntarily refused to work; and in each of the situations when District 28 representatives were called concerning the respective disputes which occasioned the stoppages, the grievances were settled and the miners returned to work.

A Benedict witness, James Scott, testified that Seroggs advised him that "I can't . . . tell you to strike.

¹⁶ The two strikes thus excluded were (1) the Water Strike of September 27, 29, 1950, and (2) the Collingsworth Strike of January 10-11, 1951.

¹⁷ The third strike excluded by the Sixth Circuit was the "Wage Stabilization Strike" of October 16-28, 1952.

¹⁸ The dates and characterization of the eight strikes are as follows:

- | | |
|-----------------------|----------------------------------|
| 1950—April 14 and 17, | the seniority strike; |
| 1951—July 30-31, | the vacation pay strike; |
| 1951—October 1-8, | the credit strike; |
| 1951—November 2, 7, | the Ernest Tabor strike; |
| 1952—February 7-8) | the M. M. Campbell strikes; |
| August 24-25), | |
| 1952—August 5-6, | the Anders-Roark strike; |
| 1953—May 18-19, | the Big Mountain Coal Co. strike |

but when I tell you when you don't get what you want why you boys know what to do then" (T. 408a); and although Scott was unable to specify the occasion (see *post*, p. 43) Benedict contended that each of the alleged strike situations occurred after such statement and that petitioner's never exercised any effort through available disciplinary measures to prevent strikes pending dispute settlements.

THE STRIKES

(1). In the seniority strike of April 14 and 17, 1950, a dispute arose over which miners were to be laid off. Benedict contended that each seam operated was a separate mine; the miners contended that seniority provisions were to be applied as one mine. The men refused to work. Benedict called Lloyd Scroggs, District 28 field representative. At a meeting between Scroggs, the mine committees, and Benedict representatives, Benedict's General Manager Darst testified he requested Scroggs to get the men back to work and arbitrate the men's grievances, yet Benedict's Superintendent Fritz related Scroggs' attitude to be to "try to get the thing settled and the men back to work and as far as anything that he did say in respect to this meeting, that if it did go before the Arbitration Board it might not be settled to suit the company or the men" (R. 567a). While Fritz could not say that Scroggs did not want it to go to arbitration, likewise he could not say that Darst wanted it to go there either. Fritz described the meeting thus: "(T)hey were in there trying to get it settled, not to take it before the Arbitration Board" (R. 568a-9a). Although Darst related Scroggs did not attempt to get the men to resume work pending settlement (R. 159a), the dispute was

settled at the meeting; and the men voted to work (R. 604a).

(2) The 1951 Agreement provided for annual vacation pay and for pro rata payments for employees. On the last pay day in June approximately 25 men had their store accounts deducted from their vacation pay (R. 166a, 274a). The Agreement's check-off provision did not provide therefor. Thus arose a dispute; and although Darst did not recall it, employees related that Darst promised that Benedict would pay this vacation pay on the last pay day in July (R. 166a, 275a, 533a). The parties met concerning these strikes "all through" July, during which Darst admits he made no request for arbitration (R. 166a, 275a, 281a). Scroggs agreed with the men. Darst was "almost positive" he requested arbitration (R. 276a) which he claimed Scroggs refused. As Darst stated, and denied by Scroggs (R. 581a), he heard Scroggs tell the mine committee after one of the meetings, "Boys, it looks like you are going to have to take this matter into your hands" (R. 167a). Upon Benedict's failure to pay the vacation pay in July, the employees struck on July 30 and 31, 1951 (R. 166a). Scroggs related he advised the men to return to work and that the matter could be settled (R. 578a). Always when called in on a dispute, Scroggs "tried to negotiate or settle the matter" (R. 597a). Thereafter the mine committee met with Darst and it was agreed that individuals could claim the full vacation pay but those willing to have amounts credited to their account could do so (R. 168a).

(3). Benedict had extended limited company store credit to idle panel members. Prior to October 1, 1951,

Benedict notified the men and the local union of its financial inability to continue the arrangement. A meeting between Benedict and the mine committee was abortive of results, and the men refused to work on October 1-8. Darst testified he tried, unsuccessfully, to get the mine committee to arbitrate (R. 169a). At a meeting between Benedict and the local union, Seroggs, who had been called by Benedict, asserted, according to Darst, that Benedict should continue the credit arrangement. Seroggs' account is that he attended one meeting at Darst's request, where he stated that Benedict should carry the men as far as it could (R. 580). Seroggs was not certain that the men were then on strike. However, at another meeting Benedict consented to continue to give credit; the local union agreed to guarantee the accounts which was what Benedict asked it to do (R. 283a); and the mines resumed operation (R. 170a, 282a).

(4). Although Darst related that a fourth strike on November 2 and 7, 1951, concerned Ernest Tabor's discharge for chronic absenteeism, and that Tabor was reemployed when District 28's field representative Clark "practically on bended knee made the company take [Clark] back to work" (R. 171a-3a), and Jim Scott, a mine committeeman, testifying for plaintiff, claimed Seroggs participated in the Tabor dispute (R. 418a), actually Clark was not employed by District 28 until July, 1952—eight months after Tabor was discharged (R. 436a) and a mine committeeman did not remember any work stoppage because of Tabor's discharge (R. 607a). Seroggs testified he knew nothing of the Tabor matter (R. 581a), and one witness related that no District 28 representative was involved (R.

550a-1a, 617a, 620a). A witness for Benedict could not recall a District 28 representative being present (R. 436a). No grievance was filed in the Tabor incident (R. 616a).

(5-6). M. M. Campbell about August 15, 1951, under a contract with Benedict, started a construction project (R. 181a-184a). Shortly thereafter Campbell discussed with District 28's field representative Seroggs about a collective bargaining agreement for his employees and joining the union himself (R. 581a-2a). Campbell's version is that he continued to work without difficulty until after the beginning of 1952. Prior thereto Campbell talked with the local union's mine committee which wanted him to hire coal miners laid off by Benedict. On January 15, 1952, a meeting was had with Benedict's Darst and Mine Superintendent Fortner, Campbell and the Mine Committee. Seroggs was called to this meeting. Darst's account is that it was insisted that Campbell employ the laid off Benedict employees (R. 185a) and credited Seroggs with saying that if the mine worked Benedict men were going to have to work on the Campbell working force (R. 187a). Campbell did not so testify, but related that Seroggs told Mine Committeeman Jim Scott "if we don't get what we want, you know what to do" (R. 340a). Seroggs (R. 585a), denying such statements were made, related he left the meeting during an argument between Campbell and Lynn, then local union president, because of the impossibility of accomplishing anything at the meeting (R. 557a, 583a-4a). Lynn testified that at no time during 1950-53 did any District representative tell the local union to strike, but to the contrary such representatives urged them to return to work (R. 577a).

Darst's testimony was that a strike occurred on February 7 and 8, 1952, over the Campbell matter (R. 189a); Campbell testified that there was a strike of one-half day (R. 340a); but Local Union President Lynn did not recall any strike (R. 552a). Following the meeting and the alleged strike, Campbell, with two local union mine committeemen of the Benedict local, went to Norton, Virginia, and signed a contract with District 28. While the record does not show the Agreement's date, Allen Condra, District 28's President at that time, who signed the agreement, testified that his notes showed that such meeting was on February 3, 1953¹⁹ (R. 661a). Campbell asserted that at this meeting Condra admitted he had the Benedict mine "blowed out" (R. 341a), a slang expression for "strike" (R. 342a). Condra depicted the meeting with Campbell as very agreeable and as Campbell's being interested in becoming a union member himself (R. 661a-3a). He related that some time thereafter Campbell called him by telephone—a conversation denied by Campbell (R. 712a)—and told him that Darst "was trying to squeeze him out and made it rough on him", to which he (Condra) told him there was nothing the union could do in such a dispute. He never heard from Campbell again (R. 662a-3a). Condra denied he had requested or directed or given encouragement to any Benedict work stoppage (R. 663a).

Darst related another two-day strike occurred in April, 1952 (R. 190a) because of Campbell's not working Benedict men and Campbell's men "not being taken into the local union" (R. 191). Campbell stated such refusal was due to the local's having "men laid off" (R. 346a). There is no evidence as to how the

¹⁹ It is apparent that the event occurred in 1952.

stoppages were concluded nor that Benedict sought aid from District 28 representatives. According to Darst, the local Committee did not want to arbitrate (R. 191a).

Campbell quit his work in August, 1952. Darst's testimony was that Campbell could not "put as big a working force to work" (R. 191a), while Campbell admitted that he kept his force at "not over eight, on account of unemployment compensation (R. 331a).

Former employees of Campbell quoted Campbell as saying the work ended because of Benedict's being "short of money" (R. 672a, 675a) and Benedict's superintendent as saying Benedict ran Campbell off the job (R. 673a).

- (7). Benedict discharged two of its employees (Anders and Roark) for negligence when a motor which they were moving plunged over an embankment (R. 173a, 629a-31a). Benedict employees refused to work on August 5 and 6, 1952. In response to Darst's call to District 28, its field representative Clark, with the mine committee, met with Benedict which agreed to return the men to work (R. 174a, 637a).

Darst related his request to Scroggs was to return the men to work and "let the company arbitrate the dispute"; that Clark's position was that Benedict had no right to discharge them and had "to give [them] back their job," and refused to arbitrate; and that Benedict "caved in" again and agreed to reemploy the men (R. 174a). Contrariwise, Clark's version was that he made no threats and after considerable discussion of the merits of the discharges, agreement was reached as to reinstatement (R. 637a) after it had been

demonstrated to Benedict that facts were otherwise than it had mistakingly believed (R. 644a).

Clark denied Benedict wanted to arbitrate this matter (R. 643a). After work resumed Benedict converted the matter into a penalty case (Exhibit 32, R. 130a-3a), and this matter of back pay for the discharged men was referred by agreement to the arbitration board, but it was settled by the aggrieved men's being given some extra work (R. 638a-9a).

(8). In March, 1953, Benedict leased two seams of coal to Ura Swisher (who later incorporated as Big Mountain Coal Company) for strip mining. Big Mountain was to deliver the coal so mined to Benedict's tippie for market preparation. Benedict, which controlled the sale of this coal through its regular sales agency, the Holmes-Darst Corporation, received 25¢ per ton for its preparation service while sales expenses were to be borne by Big Mountain (R. 195a, 303a-4a).

According to Swisher, Big Mountain employees were willing to join the union if they could have a separate local union (R. 434a-5a); and at a meeting Swisher asked Condra therefor (R. 454-6a). Condra explained that he had no authority to decide upon the matter of a separate local, that at the time Big Mountain did not have ten employees, the minimum number for a local union charter, and that he would consider the matter (R. 654a-5a). Darst's version was that Condra told Swisher that, without a contract, "We will do everything in our power to keep you from operating (R. 198a) and that he (Condra) decided whether Swisher's men were to have a separate local (R. 198a).

Swisher related that Condra insisted he sign a union agreement or otherwise there would be trouble with the Benedict local (R. 454). On May 13 Swisher advised Condra by letter (R. 455a-6a) that he was "ready to sign the contract provided his employees were granted a separate local union charter from the men of Benedict." The next day Swisher, writing to Condra, enclosed three signed copies of the 1952 Agreement conditioned upon Big Mountain's employees being granted a separate charter (R. 457a). Replying on May 18, Condra acknowledged receipt of Swisher's latter letter with its enclosures, stating that the matter of a separate charter was "a matter of Policy which will be decided by the United Mine Workers of America" (R. 657a). On the morning of May 18, without Condra's knowledge, Benedict employees struck and picketed the road leading to the Benedict mines and Big Mountain employees would not cross the picket line. Both Benedict and Big Mountain operations ceased (R. 199a, 458a). According to Local Union President Muncey the strike had been called by him because Benedict had failed to make its payment of royalties to the Fund (R. 622a) as required by the Agreement (See 1952 Agreement, Sec. 4 of "Miscellaneous", R. 114a). According to Muncey, upon his advising Benedict employees on May 18 that the royalty had not been paid, the men refused to work. Individual Benedict employees supported this testimony (R. 522a, 542a). As witness Gibson related, the strike had nothing to do with Big Mountain's activity (R. 543a). Upon Muncey's advising the men on May 19 that the royalty had been paid and that they should return to work, the men voted to do so (R. 622a). On the night of May 19 the work sign at the Benedict mine indicated no work was available

(R. 55a). Darst related that he "maybe" received word of the local union's decision on May 20 but because Benedict no longer had orders there was no work for the men (R. 313a). Benedict's superintendent on May 20 stated to one of Benedict's employees who reported for work "you say you are on strike, now Benedict is struck" (R. 546a). Other Benedict employees reported for work on May 20 but left when they saw that the sign had been changed to indicate no work (R. 522a, 539a, 622a). On that day Darst wrote a letter to UMW, copy of which was sent to Condra, complaining of an illegal work stoppage at the mine and stating it was Benedict's intention to hold UMW responsible therefor (R. 240a). Condra's reply on May 26 pointed out that on May 19 the employees had voted to return to work and had been ready since that time (R. 660a). On May 27 Benedict resumed operations when it obtained "another Lake order" (R. 202a). On the same day in a meeting called by Darst and which was attended also by Condra and Scroggs, Darst advised that he wanted to "gang work" the mine to reduce costs.²⁰ Condra refused such an arrangement (R. 589a), but there was no talk of arbitration (R. 590a) or a strike (R. 658a-9a) and at the discussion's end Swisher came in and again discussed the matter of a separate local for his employees (R. 668a-9a). An injunction issued on the same day in favor of Big Mountain was served on May 28 (R. 459a, 670a). As Condra testified, so far as he knew there was neither picketing nor trouble at the Benedict and Big Mountain operations when the injunction was served (R. 670a).

²⁰ Darst wanted to work a group of men and let them share what was made (R. 589a), an arrangement not covered in the bargaining contract.

UMW'S RELATION TO DISTRICT 28, AND THE RELATION OF EACH TO LOCAL UNIONS

A controlling question is that of agency. UMW is divided into districts and subdistricts, and local unions which alone have the right to admit employees to membership (R. 379a-85a).

The supreme authority of the International Organization resides primarily in the International Convention which meets every four years (R. 478a) when not less than 3000 delegates elected by union membership are in attendance (R. 478), but during the Convention's recess the International Executive Board is the governing body (R. 380a). UMW officers are elected by the membership (R. 477a).

A district may not issue charters (R. 475a). A district may be autonomous or provisional; it operates within the provisions of the UMW Constitution and the bargaining contracts; it has no authority to dictate to a local union unless the latter violates the Constitution or the contract (R. 477a). The number of locals in a district varies from district to district (R. 477a). District 28 is a provisional district and its president and secretary-treasurer are appointees of UMW's president (R. 510a). Local unions are set up as separate units and there is a minimum membership requirement of ten members in order to establish a local (R. 475a). Upon application to the district for a local union charter, the district president requests the UMW, assigning reasons for his recommendation, for the charter's issuance (R. 475a). If issued by UMW and approved by its Executive Board, the charter is sent to the district and the local is chartered and set up (R. 476a). Subject only to the bargaining agreement,

UMW Constitution and UMW policy, a local makes its own rules and regulations, elects its own officers, and runs its own affairs (R. 476a-7a).

FIELD REPRESENTATIVES

Field representatives have no authority to call strikes and are prohibited from doing so (R. 503a). District 28's field representatives were appointed by its district president (R. 510a).

PROVISIONS AS TO STRIKES

The constitutional provisions, which govern any local union or subordinate officer's authority to bind the International Union, gives the International Executive Board the power by a two-thirds vote to recommend the calling of a general strike after a referendum vote of the members. Article XVI forbids any district to engage in a strike involving all, or a major portion, of its members without sanction of the International Convention or Board.

Neither districts nor local unions are authorized without sanction of the International Executive Board, to call any strike for which UMW is in any way responsible (R. 758a; A. 28a).

THE SIXTH CIRCUIT'S CONCLUSIONS AND JUDGMENT

At the conclusion of Benedict's evidence in chief, Petitioners moved for, but the trial court denied, a directed verdict for Petitioners (R. 465a-6a). At the conclusion of all evidence a motion for a directed verdict in Petitioners' favor was again denied (R. 713a-4a).

Upon conclusion of the Court's jury charge (R. 716a-737a), Petitioners excepted to portions of the

charge (R. 738a-742a) which specifically raised the questions of the liability of Petitioners. Likewise Petitioners' motion for a new trial, posing such questions and issues was rejected (R. 77a-81a, 86a).

In the Sixth Circuit Petitioners urged that it was error for the District Court to charge the jury that if the jury found that the strike was encouraged, suggested or ratified by District 28 field representatives UMW and District 28 would be liable for damages resulting therefrom. The Court of Appeals rejected Petitioners' contention, holding that "The district judge was not in error in instructing the jury that District 28 and its agents were agents of the International Union with respect to the activities involved here"; that under 29 U.S.C.A., Section 185(e), the fact that field representatives of the district lacked actual authority to call strikes is not controlling; that "These representatives were sent by the District to attempt to settle local disputes at the Benedict mine"; that the declarations attributed to Scroggs, namely, 'I can't tell you boys when to strike. I can't tell you to strike, but, when I tell you when you don't get what you want why you boys know what to do', "took place while Scroggs was on these missions"; that the "calling of the strikes was one way of 'settling' a labor dispute" and that consequently the jury "were amply justified in finding that Scroggs was acting within the scope of his employment when he made the declarations in question (A. 7a-8a).

Finding there was error in the damages, the Sixth Circuit set aside the trial court's judgment and remanded the case "solely for a redetermination, in accordance with the views expressed in this opinion of the amount of damages Benedict is entitled to recover from the unions" (A. 14a, 21a).

REASONS FOR GRANTING THE WRIT

1. The Sixth Circuit has decided a federal question, important in processing of collective bargaining agreements, in conflict with interpretative standards dealing with the right of labor to strike fixed by this Court in *National Labor Relations Board v. Lion Oil Co.*, 352 U. S. 282, 293, and with an applicable, recent decision of the District of Columbia Circuit in *International Union, United Mine Workers of America et al v. National Labor Relations Board*, 257 F. 2d 211 (1958), and in probable conflict with its own approval²¹ of the district court's results in *Garmcada Coal Co. v. International Union, UMW A.*, 1954, DC, E.D. Ky., 122 F. Supp. 512.

Herein there is Sixth Circuit admission that the "no strike" provisions in contracts antedating the 1950 Agreement "were superseded" and that the "right to strike" was "expressly preserved in the 1950-52 agreement" (A. 6a); yet totally inconsonant therewith is the Sixth Circuit's antithetical conclusion that "a strike to settle a dispute which a collective bargaining agreement provides shall be settled by an exclusive and obligatory alternative procedure constitutes a violation of the agreement" (A. 6a). Thus, the Sixth Circuit holds that pending settlement of a dispute there shall be no strike or work stoppage, thus negating the very right to strike which it declared the contracting parties agreed had been preserved (A. 6a).

The Sixth Circuit's fallacy is made manifest by the bargaining history between the 1950 Agreement's signatories. First, the earlier contracts, *in the settlement*

²¹ *Garmcada Coal Co. v. International Union, UMW A.*, 6 Cir., 230 F. 2d 945.

of disputes section, committed miners to the covenant that "*Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute*"; but this proscription was first deleted in the 1947 Agreement and such deletion was continued in the 1950-1952 Agreements. Second, the Sixth Circuit reasoned that the 1950 Agreement made disputes subject to the grievance procedures because of the word "exclusively" found in the Agreement's paragraph 3 of "Miscellaneous" section; but the Sixth Circuit's reasoning overlooked and ignored the further contract fact that "stoppages", as well as disputes, were to be settled in similar manner; and that the contracting parties thereby manifested obvious recognition that stoppages would occur. Such recognition, coupled with abrogation of the no-strike provisions of earlier contracts, including the covenant that pending disputes there would be no stoppages, is positive proof that stoppages pending settlement of disputes were not prohibited and were not violative of the 1950 Agreement. The Sixth Circuit's conclusion fails to recognize that it is one thing to agree to process "stoppages" under the settlement procedures but an entirely different matter to say that there is agreement not to resort to a stoppage pending settlement. The Sixth Circuit overlooks that a strike, juridically defined as a lawful economic instrument,²² does not of itself resolve disputes²³ but that settlement thereof is only through collective bargaining, and that is precisely what occurred in the

²² *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 209.

²³ Accord: *W. L. Mead, Inc. v. Int. Bro. of Teamsters*, DC, Mass., 126 F. Supp. 466, 467, wherein it is said: "... a strike never 'adjudicates' anything".

instant case. The fact that the earlier agreements specifically prohibited stoppages pending settlement shows that when the parties intended such result they knew how to effectuate it in clear and positive language. Its absence from the 1950-52 Agreements is a positivism that the result reached by the Sixth Circuit was not the intent of the Agreement's signatories.

The Sixth Circuit's conclusion is even more patently offensive in its applicability to the 1952 Agreement. As previously shown, the 1952 Agreement did not require that *stoppages* be settled under the grievance machinery, *nor indeed that disputes be settled exclusively thereunder*. By this latter Agreement the parties agreed that (1) stoppages were not to be settled under the grievance machinery and (2) the grievance machinery no longer constituted the exclusive method for settlement of disputes. If the contracting parties intended that there should be no work stoppages pending settlement of disputes, why would they have studiously deleted the earlier contracts' requirement that "pending the hearing of disputes, the Mine Workers shall not cease work" and why would they, with assiduity, have provided for the rescission of the no-strike and like clauses? It is indeed illogical and unsound to argue that the parties would have thus so unequivocally manifested the miners' right to strike, even during the pendency of the dispute settlement, and then in the same instrument to have intended, by implication, to proscribe strike action; but such is the Sixth Circuit's result. It attributes to the signatories the doing of a meaningless thing. The legislative history of the Act clearly supports the view that labor's right to strike remained an appropriate subject for collective

bargaining;²⁴ and the Sixth Circuit's interpretation finds challenge in this Court's declaration that "Where there has been no express waiver of the right to strike, a waiver of the right during such a period is not to be inferred".²⁵ The Sixth Circuit's conclusion results in an emasculation of the parties' agreement, contrary to this Court's professions that plain provisions of a valid contract may not be ignored. *Colgate-Palmolive Pect Co. v. NLRB*, 338 U. S. 355, 363. It finds challenge, too, in the principle that denies implied terms which "are inconsistent with expressed provisions. 12 Am. Jur., Contracts, Section 239. Aptly stated are Mr. Justice Cardozo's words in *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 169 N.E. 391, 393:

"Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent No one is under a duty to resort to these conventional tribunals . . . except to the extent he has signified his willingness [Contracting parties] . . . are not to be trapped by a strained and unnatural construction of words of doubtful import into an abandonment of legal remedies, unwilled and unforeseen."

The District of Columbia Circuit²⁶ was concerned with the issue presented herein in *International Union, UMW v. NLRB; supra*, as it related to the 1952

²⁴ Senate Report No. 105, 80th Congress, 1st Session, pp. 17-18, reported in Legislative History of the Labor Management Relations Act, 1947 (Government Printing Office), Vol. I, p. 424.

²⁵ *National Labor Relations Board v. Lion Oil Co.*, 352 U. S. 282, 293. That Board's yardstick is that renunciation of the right to strike "will not be found to exist unless expressed in clear and unequivocal language". *Tectron Puerto Rico*, 107 NLRB 583, 587.

²⁶ Herein called the "District Circuit".

Agreement and reached a conclusion contrary to that of the Sixth Circuit herein. Noting that a "strike while collective bargaining is going on, and for the coercive purpose of obtaining a favorable bargain, is a rather ordinary occurrence", absent a contract not to strike, the District Circuit rationalized that "It is hardly conceivable that a stoppage of work could occur except as a consequence of a dispute which would be cognizable under the grievance procedure" (257 F. 2d 211) and that

"If we are to credit the parties with normal capacity to reason and express themselves, we cannot read subsection 3 as a 'no strike' agreement . . .".

The Sixth Circuit noted the inconsonancy of its decision with that of the District Circuit but cast its preference with the views of the dissenting Judge, the Fourth Circuit's *United Construction Workers v. Haislip Baking Co.*, 4 Cir., 223 F. 2d 873, and the First Circuit's *W. L. Mead, Inc. v. Int. Brotherhood of Teamsters*, 126 F. Supp. 466, 1954, DC, Mass., aff'd. 230 F. 2d 576.

The District Circuit in *International Union, United Mine Workers of America v. NLRB, supra*, appraised the *Haislip Baking Co.* and the *W. L. Mead, Inc.* cases "as expressions which support the Board's preference" (257 F. 2d 247) but declared that "Such a preference is, however no justification for, by the process of benevolent interpretation, making a contract for the parties which, to a moral certainty, they did not make for themselves" (257 F. 2d 247-8). Such reasoning, petitioners submit, is likewise apposite to the Sixth Circuit's conclusion herein. The reasoning employed in the dissent (257 F.2d 218)

in the District Circuit case that the strike constituted "pressure tactics" which were "in violation of *express* contract provisions" is not only contrary both to the bargaining history of the contracts and to the specific language thereof, but reflects also the dissenter's total lack of familiarity with or concern for the congressionally-declared policy that the right to strike shall be a subject for collective bargaining, that the Act's legislative history supports the view that the right to strike was preserved and so recognized by this Court in *NLRB v. International Rice Milling Co.*, 34 U.S. 665, 673, and this Court's standard in *Lion Oil Co.* (fn. 25 herein) that absent an express waiver, an implied waiver of the right to strike is not to be inferred. And, since Benedict's cross-claim is based, in part, upon Section 301 of the Act, it is significant that the dissent ignores the congressional command, as did the Sixth Circuit also, found in the Act's Section 13 that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike". The dissent's unsoundness is plenarily demonstrated in its statement that "the presence or absence of a 'no strike' clause is beside the point" (257 F.2d 219). The Sixth Circuit's agreement with the dissent, adopting its fallacies and infirmities, thus of necessity renders and stamps the Sixth Circuit's conclusion as tainted, untenable and erroneous.

The Sixth Circuit's use of the *Haislip* and *Mead* cases in support of its conclusion is abortive. So far as the 1950 Agreement is concerned, neither *Mead* nor *Haislip* contained positive covenants, as does the 1950 Agreement, that prior no-strike clauses are rescinded.

and made null and void; they contained only arbitration procedure provisions; and it is noteworthy that in *Mead* the district court's opinion declares that "an arbitration clause is not the same thing as a 'no strike' clause, and cannot . . . have such broad consequences" (126 F. Supp. 467) and that there was no testimony "that the Union specifically wanted to protect its right to strike" (126 F. Supp. 469). As to the 1952 Agreement, *Mead* and *Haislip* are clearly distinguishable, for, unlike the 1952 Agreement from which the parties had by collective bargaining deleted the word "exclusive", both *Mead* and *Haislip* agreements, silent as to any prior no-strike clauses, required the grievance machinery to be the *exclusive* method.

Further, there is probable conflict between the Sixth Circuit's conclusion herein and its approval of the district court's reasoning in *Garmeada Coal Co. v. International Union, UMW*, 122 F. Supp. 512, aff'd., 6 Cir., 230 F. 2d 945, which concerned itself, in a damage action against UMW, a local union and a district, with the right to strike under the 1950 Agreement; and although the trial court incorporated in its decision the "Settlement of Local and District Disputes" section of the Agreement, it observed that the miners were "pursuing their right to strike regardless of the provisions of the" agreement (122 F. Supp. 518).

The foregoing discussion demonstrates the conflict of the Sixth Circuit's conclusion with decisions of this Court and of the District Circuit, in addition to its being erroneous. Congress having made it clear that the right to strike was a matter for collective bargaining and had been preserved as a matter of federal policy, except as that body had curtailed it in the Act or as labor had contractually waived such right, a

judicial opinion, such as the instant one, which has been translated into a money judgment for damages, negating such right should appropriately be reviewed, and this is particularly true where, as here, the agreement is one covering so important an industry as the bituminous coal industry and covering conditions of employment of hundreds of thousands of coal miners.

2. The Sixth Circuit's conclusion of UMW's and District 28's responsibility to Benedict for the work stoppages is premised upon (a) its approval of the district court's jury instruction that as a matter of law "District 28 and its agents were agents of the International Union with respect to the activities involved herein" and (b) that District 28's field representative Seroggs told Benedict employee Scott prior to the first strike and several times thereafter, "I can't tell you boys when to strike. I can't tell you to strike, but when I tell you when you don't get what you want why you boys know what to do" (A. 7a-8a). The Sixth Circuit's conclusions have thus decided federal questions of union responsibility in a way which conflicts with applicable decisions of this Court, the Fourth Circuit and the Sixth Circuit and is violative of the Act's Section 301(b) and (c) and of Congress' intent in enacting such provisions. The Sixth Circuit's conclusions pose issues important in the administration of labor law, warranting review by this Court. *Local Union No. 10, etc. v. Graham*, 345 U.S. 192.

The Sixth Circuit's imputation of responsibility to UMW for acts of a District 28 field representative on the basis that "District 28 and its agents were agents of UMW," as the jury was charged (R. 729a), finds full challenge in the *Coronado* doctrine.

enunciated and implemented by this Court more than thirty years ago when, applying common law principles of agency, it made clear that mere affiliable relationship between an affiliate and a parent organization does not establish an agency. Its mandate in the *Coronado* cases²⁷ was that UMW and an affiliate district were separate juristic entities under provisions of the UMW's Constitution (which are identical with those in evidence in this case) and that the juridical test to be employed in determining parent organization responsibility for affiliate conduct was one of "actual agency" and whether the parent organization was "shown by any substantial evidence to have initiated, participated in, or ratified" wrongful conduct. Current efficacy of the *Coronado* doctrine in determining union responsibility in the field of labor relations is mirrored by decisions of federal courts and the National Labor Relations Board. Soon after Taft Hartley Act's adoption, the latter agency, interpreting that Act's agency section 2(13), declared the Board "has a clear statutory mandate to apply the ordinary law of agency" and proclaimed "the authority of the *Coronado* cases";²⁸ and recently it had occasion again to point out that the "overwhelming judicial authority" has approved the doctrine that an union affiliate is a juristic entity separate from its international parent organization, citing the *Coronado* cases.²⁹ The Sixth Circuit itself recognized that a local union and a district affiliated with UMW were

²⁷ *UMWA v. Coronado Coal Co.*, 259 U. S. 344, 393, 395; *Coronado Coal Co. v. UMW*, 268 U. S. 295.

²⁸ *Sunset Line and Twin Co.*, 79 NLRB 1487, 1507, 1514, fn. 57.

²⁹ *Franklin Electric Construction Co.*, 121 NLRB No. 26, 42 LRRM 1301, 1303 (July 24, 1958).

entities separate from UMW in *Garmcada* (230 F. 2d 945).³⁰

In *Haislip*, too, the Fourth Circuit, concerned with the Act's Section 301(b) and (c) and denying UMW's responsibility for conduct of agents of United Construction Workers, declared (223 F. 2d 877) that there is no liability "on the part of a union for a strike with which it has had nothing to do".

Moreover, in *Garmcada* the trial court held that strike action by a local union officer was not attributable to either the UMW or an affiliated district.³¹ In opposition to its conclusion and action in the instant case, the Sixth Circuit in *Garmcada* (230 F. 2d 945) approved, citing the *Haislip* case.

The Sixth Circuit's conclusion that District 28's agent Scroggs was an UMW agent finds challenge, too, in the *Coronado* cases. Therein (259 U. S. 393) this Court made it clear that only UMW's Executive Board, under the Union's Constitution, could "ratify a local strike"; and there is a total lack of evidence herein of any such Executive Board authorization.

There is also decisional challenge in imputing to UMW and District 28 responsibility for conduct attributed to Scroggs.

³⁰ In *Garmcada*, 122 F. Supp. 512, the district court filed "Additional Findings and Conclusions" on August 5, 1954, which are unreported but are set forth in the Appendix hereto, *post*, p. 23d, holding that UMW, a local and a district thereof "did not together constitute a single entity"; and upon appeal the Sixth Circuit agreed (230 F. 2d 945).

³¹ The trial court held that (1) "the act of the Local by engaging in the strike . . . was not the act of the defendant International Union or District 19" (A-23a).

To hold UMW and District 28 responsible, the Sixth Circuit imputed to them the statement allegedly made by District 28's field representative Scroggs to Scott (*ante*, p. 36). Noting that Section 301(e) makes actual authorization of specific facts "unnecessary" rather than "not controlling" as the Act provides, and that the fact that District 28's representatives lacked strike authority was not controlling, the Sixth Circuit reasoned "These representatives were sent by the District to attempt to settle local disputes at the Benedict mine", the "declarations attributed to Scroggs all took place while he was on these missions" and that "The jury were amply justified in finding that Scroggs was acting within the scope of his employment when he made the declarations in question" (A. 7a-8a). The speciousness of such reasoning is found in the Fourth Circuit's *Haislip* case.

Haislip, like the instant case, dealt with UMW's and United Construction Workers' responsibility for alleged wrongful conduct of the Construction Workers' regional director and field representative called in by an employer in connection with a strike by employees. Witnesses attributed to the regional director the statement, in response to an inquiry by one of Haislip's employees as to when they were to return to work, "You will go back to work when I tell you to and not before" (223 F. 2d 875). In reversing a judgment against both unions and directing the trial court to enter judgment for them,³¹² the Fourth Circuit

³¹² Application for certification by Haislip Baking Company was denied, 350 U. S. 847. The Fourth Circuit was concerned with the agency definition in the Act's Section 301(e), which is identical with that found in the Act's Section 2(13). See Appendix hereto, p. 25a.

rejected the claim that the regional director and field representative had implied authority in the matter, saying (223 F. 2d 878):

"It is hardly conceivable that authority to adopt, to participate in or to encourage such strikes, which are clearly inimical to the interests of a union, should be vested in field officers or regional directors. We find nothing in the record to justify a finding that either Morris or Belcher had such authority."

In the instant case it appears affirmatively that Scroggs had no authority to call a strike; UMW's Constitution fully challenges the right of a District agent to call one; and UMW's directive against unauthorized strikes clearly rejects either actual or implied authority to do so. Thus are the infirmities of the Sixth Circuit's holding made plain and positive.

United Mine Workers of America v. Patton, 4 Cir., 211 F. 2d 742 (1954), cited by the Sixth Circuit (A. 8a), is inapposite. Whereas in *Patton*, the Fourth Circuit based UMW's responsibility upon its finding that "in carrying on organizational work the field representative is engaged in the business of both the international union and the district" (211 F. 2d 746), in *Haislip* it distinguished the *Patton* ruling, saying that the Haislip strike had not arisen out of activities in which the defendants therein "had an interest and in which their representatives might be held to have implied authority to participate in protection of that interest" (223 F. 2d 878). Thus, in the instant case, the stoppages concerned matters of interest to the local only, the Sixth Circuit's opinion having rejected a strike which concerned a dispute "national in scope" as being violative of the Agreements (A. 7a). Thus, another infirmity of the Sixth

Circuit's conclusion is reflected in its violation of the rules that an agent's authority "includes only authority to act for the benefit of the principal" (2 Am. Jur., Agency, Section 85) and "it is inferred that an agent has authority to act only for the principal's benefit" (Restatement of the Law, Agency, Vol. 1, section 166(b); p. 406).

The question of a parent labor organization's liability and responsibility for alleged wrongful conduct of an affiliate and of an affiliate's agent, as well as the question of the affiliate's liability therefor, pose important questions in labor relations. A judicial interpretation of that liability and responsibility which erroneously interprets the Act's agency provisions and which offends both the intent of Congress and judicial precedents and is at total variance with legal principles followed by federal courts and the National Labor Relations Board in the field of labor relations, should be reviewed.

3. The insufficiency of evidence upon which to predicate petitioners' responsibility for the alleged strike activity, as to whether there was support for the jury's finding and the trial court's approval thereof that petitioners' representatives with authority had induced strikes, that petitioners had failed to observe the grievance procedures and other provisions of the Agreements, and that such strikes were cognizable under the grievance procedures, was an issue asserted in the trial court and Sixth Circuit (R. 740a-742a). Petitioners again complain of such insufficiency and the Sixth Circuit's failure and refusal to sustain petitioners' position. Heretofore, in damage actions authorized by a federal statute this Court has, under the certiorari process, concerned itself with the issue

of an asserted insufficiency of the evidence. *Herdman v. Pennsylvania Ry. Co.*, 352 U.S. 518. Like concern is presented herein. Approbation of union responsibility upon testimony of the kind found herein in connection with the processing of day-to-day disputes arising under collective bargaining agreements would indeed be invitatory in future agreements to total or partial rejection of grievance machinery provisions currently found as a satisfactory medium for settling disputes. The issue of insufficiency of evidence is important in the administration of labor law, meriting issuance of the writ of certiorari. *Local Union No. 10, etc. v. Graham, supra.*

The trial court charged the jury, not only that the right to strike did not exist, but that UMW and District were liable upon jury belief that strike action by Benedict's employees were encouraged, suggested or ratified by District 28's officers, representatives or agents (R. 729a) or if UMW representatives "failed or refused to use their good officers, as provided in the Agreements for adjudication of disputes (R. 729a).

In the trial court³³ and in the Court of Appeals, petitioners contended, and now contend, the evidence is insufficient to support a jury finding that UMW and District 28 violated the Agreements in connection with the various strikes discussed herein (*ante*, p. 17-25). The Sixth Circuit, like the trial court, disagreed with such contention and held that such strikes "resulted from localized labor disputes which were cognizable under the" contracts settlement procedures (A.

³³ In the trial court, this contention was included in petitioners' motions for directed verdict (R. 465a, 713a), both denied, in their motion for a new trial, likewise overruled (77a, 86a), and in their exceptions to the trial court's jury charge (R. 738a-742a).

7a), concluded that the strikes were in contravention of the Agreement (A. 6a), and gave an affirmative answer to what it classed "the real issue", namely, "whether the District's agent did induce the strikes in question (A. 7a).

Noting that the evidence on that issue was "sparse and conflicting" but "sufficient to sustain the jury's finding", the Sixth Circuit quoted a statement attributed to District 28's field representative Scroggs by Benedict's former employee Scott, denied by Scroggs (A. 8a), that, "I can't tell you boys when to strike. I can't tell you to strike, but when I tell when you don't get what you want why you boys know what to do" (A. 7a-8a), and utilized it as the sole predicate for its conclusion that petitioners were responsible for the strikes. While the Sixth Circuit observed that such statement was "made prior to the first strike and several times thereafter" (A. 7a-8a), on direct examination Scott was unable to fix the time or times of such alleged statement.³¹ While Scott declared Scroggs made the statement *to him* several times (R. 408a, 411a) during the period 1950 to 1953, on cross examination he was unable to fix the time, saying "That was all I know about it"; but finally on redirect he responded affirmatively to a question by Benedict counsel whether the statement was before the first strike and stating that there were several strikes after the statement was made (R. 424a). *Significantly, no*

³¹ Asked if the statement had been made at the time of the seniority or first strike or prior thereto, Scott replied, "Well, I don't remember whether right at that time or not . . ." (R. 408a). Again, Benedict counsel inquired:

"Q. At that particular strike did he advise you as to whether or not you knew what to do?", and Scott answered,

"A. I can't remember right off whether he did or not at that strike" (R. 408a).

other employee related that such statement was made; even Scott's testimony is that the statement was made only to him; and Scott never transmitted it to any other employee. Actually Scott admits he called none of the strikes (R. 423a).

When it is considered that Scott's testimony is the sole support for the jury award of damages against UMW and District 28, petitioners submit that a review of this case is most appropriate. As was stated in the district court's *Garmcada* case (122 F. Supp. 518):

“Vicarious liability should rest upon more convincing evidence than that relied upon by plaintiff”.

Petitioners likewise assert that petitioners' liability should rest upon more convincing evidence than that relied upon by the jury, the trial court and the Sixth Circuit.

In addition to contending that the right to strike did not exist. (which petitioners deny and have already discussed), Benedict complained that since the disputes were not submitted to arbitration, and petitioners failed to use their best efforts to prevent strikes, the agreements were violated. Initially to be noted is the fact that the settlement of disputes section enumerated several steps in the procedures, the last of which was arbitration. The agreements neither required nor contemplated that every dispute should be arbitrated. To the contrary, the procedures contemplated that *before the arbitration step*, through bargaining the parties would undertake to effectuate a settlement of the disputes short of arbitration (R. 104a-5a). The settlement provisions provided that an earnest effort would be made to settle differences immediately; and step 3 read “Through District representatives of the United Mine Workers of America and

a commissioner representative (where employed) of the Coal Company (R. 104a-105a).

In the first strike situation, the undisputed evidence is that Seroggs was "trying to get the dispute settled" (R. 430a, 567a, 574a). Likewise the evidence shows that in every stoppage situation, upon Benedict's request, a District 28 representative responded for the purpose of effecting settlement of the dispute between Benedict and the miners pursuant to the grievance procedures in the contract. Settlement of the disputes thus obviated the necessity of resorting to the last step of the grievance machinery which was the arbitration step. Consonant with the district court's reasoning in *Garméada* (122 F. Supp. 518) that "these representatives of the Union did all that could reasonably have been expected of them", in the instant case in effecting settlement of the disputes, district employees did all that reasonably could have been expected.

Further, neither the vacation pay dispute, the credit dispute, nor the Campbell or the Big Mountain dispute was cognizable under the Agreements. Submission of these disputes to the jury as contract violations was erroneous, as were its findings thereon.

4. Upon Scott's testifying that Representative Seroggs told him, a union member, that "When we didn't get what we wanted, we knowed what to do", the trial court, over petitioners' objection (R. 408a), permitted Scott to answer the question "What did you understand him to mean when he said, 'You know what to do'?" with the response "Well, we know, when he told us, we knowed to strike". Since, as above shown, Scott alone directly connected District 28 with

any of the strikes, the effect of his answers upon the jury cannot but have been prejudicial to petitioners. In a comparable situation the Tennessee court in *Girdner v. Walker*, 48 Tenn. 186, held it error to give "the conclusion of the witness as to the contents of the letters and not the contents". So, too, in 32 C.J.S., Evidence, Sec. 451, it is said that, "a witness cannot state his understanding of the language used" in writings, and he may not "state the impression made on him by oral statements" and that

"One who heard a statement or conversation may not testify as to what he or another person understood by it".

The highly and obviously prejudicial answer stating such understanding permeates the entire jury finding on the issue of liability as to UMW and District 28 and is indeed invitatory to a review of the matters set forth herein. Though petitioners contended this to be prejudicial error in the Sixth Circuit, it did not concern itself therewith in its opinion. This issue, a ground for a new trial (R. 77a), should be reviewed.

5. While the Sixth Circuit stated that "it is unnecessary" to consider whether the M. M. Campbell strikes and the Big Mountain Coal Company strike (*ante*, pp. 20, 23) were violative of the Act because of its having decided that the strikes were prohibited by the Agreements, since the case is remanded for the ascertainment of damages, and the jury's finding of damages included amounts for alleged losses in each of these strikes it becomes imperative that the issue of whether the evidence warranted submission to the jury of these questions be reviewed for guidance on the retrial.

In the trial court, petitioners asserted their position in connection with such disputes and alleged strikes in their motions for directed verdicts (R. 465a, 713a-4a) and in their jury charge exceptions (R. 739a, 740a), and in the motion for a new trial (R. 77a, 79a) which were denied (R. 86a, 466a, 716a). Discussion (p. 42-45) of the insufficiency of evidence of petitioners' responsibility is applicable to these situations and reference is made thereto. The situations will be considered *seriatim*.

(1). Facts relating to the M. M. Campbell strikes are set forth herein (p. 20).. Benedict contended that such strikes were violative of the Act's Section 303, in addition to being violative of the agreements. Section 303's provisions appear in the Appendix hereto (p. 26a). Campbell's contract with Benedict provided for payment to him of \$25.00 a day for services "as boss" (R. 182a-3a, 352a) which made of him a person in the nature of a foreman more than an "independent contractor". Campbell testified that while he hired the men who worked with him Benedict furnished the money for their wages each week, as well as furnishing the materials for the work (R. 182a). Upon quitting Campbell received nothing in addition to the money he received as the work progressed and he was not asked to return any of the money "advanced" to him (R. 361a-2a). *United Brick and Clay Workers v. Decna Artware, Inc.*, 6 Cir., 198 F. 2d 637, cert. den. 344 U.S. 897, rehearing den. 344 U.S. 919, declares that Section 303 contemplates a "secondary" pressure on a neutral employer to bring pressure on the primary employer involved in the dispute. Translating these terms to the instant case Benedict would be the neutral employer and Campbell the primary

employer in the dispute. Petitioners submit that Benedict and Campbell were one and the same employer and therefore there is not in this situation a neutral and a primary employer so as to bring the M. M. Campbell work stoppages within Section 303's scope and therefore there was not a sufficient evidential basis to warrant the Court's submitting to the jury the question of whether petitioners had violated, and in the jury's finding that they had violated, Section 303 of the Act.

(2). Section 303 prohibits a strike where an objective is one of four specifically stated objectives. Under Benedict's theory the objection of the Big Mountain Coal Company strike on May 18 was to force Big Mountain's employees into the Benedict local union (R. 311a). A strike for such purpose is definitively not one to accomplish any one of the four objectives enumerated in Section 303. Hence as a matter of law there is no evidence to support a finding of the violation of said section with regard to this strike.

Further, as stated in the Campbell strike situation, Section 303 contemplates a neutral and a primary employer. Benedict and Big Mountain were not neutral; their operations were at the same location; they were integrated to the point that the same employees processed the coal produced by both Benedict and Big Mountain; and it was a part of their agreement that all of Big Mountain's coal was to be sold through the Benedict sales agency, a principal stockholder of which was Benedict's President.

For such reasons it was clearly error for the court to submit to the jury the question of whether petitioners had violated, and in the jury's finding that they had violated, Section 303 of the Act.

CONCLUSION

For the foregoing reasons, Petitioners, and each of them, pray that this Petition for Writ of Certiorari should be granted and that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit entered in said case No. 13,056 on September 26, 1958, as aforesaid.

Respectfully submitted, 4

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APPENDIX A

Filed Sept. 26, 1958

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 13,055 and 13,056

JOHN L. LEWIS, CHARLES A. OWEN and JOSEPHINE ROCHE,
as Trustees of the United Mine Workers of America
Welfare and Retirement Fund, *Appellants*,

v.

BENEDICT COAL CORPORATION, *Appellee*.

UNITED MINE WORKERS OF AMERICA, and UNITED MINE
WORKERS OF AMERICA, DISTRICT 28, *Appellants*,

v.

BENEDICT COAL CORPORATION, *Appellee*.

Appeal from the United States District Court for the
Eastern District of Tennessee, Northeastern Division.

Decided September 26, 1958

Before SIMONS, Chief Judge, MILLER and STEWART, Cir-
cuit Judges.

STEWART, Circuit Judge. The parties to these consoli-
dated appeals are John L. Lewis, Charles A. Owen, and
Josephine Roche, as Trustees of the United Mine Work-
ers of America Welfare and Retirement Fund; Benedict
Coal Corporation; United Mine Workers of America; and
United Mine Workers of America, District 28. For econ-
omy the parties will be referred to, respectively, as the

Trustees, Benedict, the International Union, and District 28 (and the latter two collectively as the Unions). The United Mine Workers of America Welfare and Retirement Fund will be referred to as the Fund.

This action originated when the Trustees sued Benedict, a coal mine operator, to recover royalties allegedly due the Fund under the National Bituminous Coal Wage Agreement of 1950 and the amendment to said agreement of 1952, with respect to coal mined by Benedict from March, 1950, to July, 1953. The agreements in question were negotiated between the International Union and an employer association representing Benedict and other employers. Under the agreements Benedict was obligated to pay the Fund thirty cents for each ton of coal it produced during part of the period involved and forty cents for each ton it produced during the remainder of the period. Cf. *Lewis v. Quality Coal Corporation*, 243 F. (2d) 769 (7 Cir., 1957). Although Benedict did make some payments to the Fund for coal mined during the period in question, it was stipulated before trial that additional coal had been mined by Benedict upon which royalties in the amount of \$76,504.26 had not been paid.

Benedict's answer to the complaint denied liability upon the ground that the Trustees were beneficiaries of the 1950-52 agreement between Benedict and the International Union that therefore any defenses, counterclaims or set-offs which Benedict had against the International Union were available against the Trustees, and that the International Union had breached the agreements by causing a series of strikes, all of which were in violation of the agreements and two of which were also in violation of the Labor Management Relations Act of 1947, damaging Benedict in excess of the amount sought by the Trustees. Benedict also defended upon the ground that even if the International Union had not been responsible for the strikes,

the misconduct of Benedict's individual employees constituted a defense to the Trustees' action, because these employees were beneficiaries of the Trust.

In addition to its answer filed in response to the Trustees' complaint,¹ Benedict filed a cross-claim against the Unions, claiming damages resulting from the series of strikes between April, 1950, and May, 1953, allegedly caused or ratified by the Unions in violation of the aforesaid agreements and, in the case of two of these strikes, also allegedly in violation of the secondary boycott provisions of the Labor Management Relations Act of 1947. The cross-defendant Unions denied any violation on their part of either the agreements or the federal statute.

After a lengthy trial the issues were submitted to a jury, upon instructions that damages to Benedict caused by wrongful acts of its employees would constitute a defense to the Trustees' action, but that Benedict could recover on the cross-claim only upon a finding that wrongful acts of the individual employees had been caused or ratified by the Unions. The jury returned a verdict finding that the Trustees were entitled to recover unpaid royalties in the stipulated amount of \$76,504.26, and that Benedict was entitled to a set-off against this amount of \$81,017.68, the amount in which the jury found in the cross-claim that Benedict had been damaged by the Unions. In accordance with his interpretation of the jury's verdict the district judge entered judgment for Benedict against the Unions for \$81,017.68 and granted execution of the same. He further entered judgment in favor of the Trustees against Benedict in the amount of \$76,504.26, but instead of ordering execution upon this judgment, provided that it should be paid, under the administration of the court, from the

¹ Benedict also filed a counterclaim against the Trustees for the recovery of royalties it had actually paid during the period involved. The counterclaim was denied by the district court in a summary judgment, from which Benedict has not appealed.

proceeds of Benedict's judgment against the Unions.² From this judgment the Trustees have appealed, as have the Unions.

The issues presented by the appeals of the Unions will be dealt with first, since their determination affects the disposition of the Trustees' appeal. The many errors claimed by the Unions relate to three basic issues: (1) Did any or all of the strikes in question violate the agreement of 1950-52 or the Labor Management Relations Act if they were caused by the Unions? (2) If so, was there sufficient evidence to support a finding that either District 28 or the International Union was responsible for any or all of the strikes? (3) If so, were the damages assessed against the Unions excessive?

At the outset the Unions deny liability for damages resulting from the strikes on the ground that the right to strike was preserved in the 1950-52 agreement. It is true that the agreement expressly stated that the "no strike" provisions of the previous contracts were superseded.³ However, the agreement provided in detail the procedure to be followed for the settlement of localized disputes or

² "In accordance with the Court's interpretation of the offset provision in the jury's verdict and as a means of carrying out the intended effect of the verdict, it is ordered that the Benedict Coal Corporation have and recover the sum of \$81,017.68 from United Mine Workers of America and United Mine Workers of America District 28, for which execution may issue.

"It is further ordered that said sum of \$81,017.68 be paid into the registry of the Court to be disbursed by the clerk in accordance with instructions appearing below.

"It is further ordered that said Trustees, in accordance with the verdict rendered in their favor, have and recover of Benedict Coal Corporation the sum of \$76,504.26, said recovery to be had in the manner following: From the aforesaid \$81,017.68 ordered paid into the registry of the Court, that the sum of \$76,504.26 be paid to said Trustees. That the difference between \$76,504.26 and \$81,017.68 be paid to Benedict Coal Corporation."

³ "1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any 'no strike' or 'Penalty' clause or clauses or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void."

grievances.¹ This procedure was also made exclusive and obligatory by the following provisions:

"3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspension of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry.

"4. The United Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement."

4. Settlement of Local and District Disputes.

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

"1. Between the aggrieved party and the mine management.

"2. Through the management of the mine and the Mine Committee.

"3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

"4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

"5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

These sections were revised in the 1952 amendment, but the obligation to resort to the specified procedure was not substantially changed.⁵

Determination of this preliminary issue thus depends upon what effect the agreement to settle all local disputes in accordance with the "Settlement of Local and District Disputes" procedure had upon the right to strike which was expressly preserved in the 1950-52 agreement. The question is not without precedent. The same basic issue was thoroughly considered in *United Constr. Workers v. Haislip Baking Co.*, 223 F. (2d) 873 (4 Cir., 1955); *W. L. Mead, Inc., v. Int'l. Brotherhood of Teamsters*, 126 F. Supp. 466, aff'd, 230 F. (2d) 576 (1 Cir., 1956); and *International Union, United Mine Workers of America v. National Labor Relations Board*, ... F. (2d) ... (D.C. Cir., June 12, 1958). With all respect for the majority view expressed in the latter decision, we agree with the dissenting judge in that case, and with the decisions in the *Haislip* and *Mead* cases, that a strike to settle a dispute which a collective bargaining agreement provides shall be settled by an exclusive and obligatory alternative procedure constitutes a violation of the agreement.

This conclusion does not make meaningless the express abrogation of a no strike clause in the 1950-52 agreement. The right to strike was preserved with respect to all disputes not subject to settlement by other methods made exclusive by the agreement. Moreover, the Unions remained free from liability for spontaneous or "wildcat" strikes. Such spontaneous strikes would be the kind of "stoppages"

⁵ 3. The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts."

and "suspensions of work" which the agreement made subject to the settlement procedure therein provided.

Viewing the eleven work stoppages in question by these standards, and without stating the facts in detail, we conclude that the evidence was insufficient to show that the stoppage of September, 1950, the "Water Strike," and the stoppage of January 10-11, 1951, the "Collingsworth Strike," were concerted strikes resulting from a labor dispute. These were clearly spontaneous work stoppages, and consequently, they did not constitute violations of the 1950-52 agreement. As to the remaining strikes, we conclude that, except for the "Wage Stabilization Strike" of October, 1952, the evidence was sufficient to support the jury's determination that they resulted from localized labor disputes which were cognizable under the settlement procedure provided by the agreement.⁶ The October, 1952, strike resulted from the refusal of the operators to pay negotiated wage increases in the absence of approval by the Wage Stabilization Board. Being national in scope, this dispute was not under the agreement subject to settlement on the local or district level.

The second basic contention of the International Union and District 28 is that even if the agreement prohibited strikes with respect to local disputes, the strikes in question were not authorized or ratified by the International Union or District 28. It is clear from the record that the district judge was not in error in instructing the jury that District 28 and its agents were agents of the International Union with respect to the activities involved here. The real issue is whether the District's agent did induce the strikes in question. The evidence on this issue was sparse and conflicting, but was sufficient to sustain the jury's finding. Scott, a former employee of Benedict and a member of the local mine committee, testified that prior to the

⁶ This being so, it is unnecessary to consider whether two of these strikes also violated the Labor Management Relations Act of 1947.

first strike and several times thereafter he was told by Seroggs, a field representative of District 28, "I can't tell you boys when to strike. I can't tell you to strike, but when I tell you when you don't get what you want why you boys know what to do." Scott was then permitted to testify as to his understanding of Seroggs' statement. Seroggs unequivocally denied having made this statement. By their finding the jury chose to believe Scott rather than Seroggs. This was their prerogative.

The jury were properly instructed that the Unions were responsible for the acts of their representatives only if the latter were engaged within the scope of their employment or authority, but that actual authorization of specific acts was unnecessary. 29 U. S. C. A., § 185 (c). Moreover, the fact, if it is so, that field representatives of the District lacked actual authority to call strikes is not controlling. These representatives were sent by the District to attempt to settle local disputes at the Benedict mine. The declarations attributed to Seroggs all took place while he was on these missions. The calling of a strike was clearly one way to "settle" a labor dispute, although a way not permitted by the agreement. Consequently the jury were amply justified in finding that Seroggs was acting within the scope of his employment when he made the declarations in question. Compare, *United Mine Workers v. Patton*, 211 F. (2d) 742 (4 Cir., 1954), with *Garmcoda Coal Co. v. International Union*, 122 F. Supp. 512 (E. D. Ky., 1954), aff'd. 230 F. (2d) 945 (6 Cir., 1956).

Finally, the Unions contend that even if liability for the strikes is imputable to them, the finding of damages in the amount of \$81,017.68 was excessive and not supported by the evidence. For the reasons which follow we agree with this contention. Since the total verdict for Benedict was in the exact amount demanded in its cross-claim, the jury must have accepted each item of damage and at-

tributed to it the respective amount claimed by Benedict.⁷ Included in the items of loss claimed was \$21,534.85, representing the amount expended on a construction project which was abandoned after construction was interrupted by strikes in February and April, 1952. We agree with the appellants that the district court erred in permitting the jury to consider this item as part of Benedict's damages. Benedict received materials and services for the entire \$21,534.85. If Benedict subsequently decided to abandon the project and to write off the amount spent, it is difficult to see how the Unions thereupon became liable for the loss.⁸ Clearly this loss, if it be treated as such, is an item of special damages which could not have been within the contemplation of the parties to the contract. Compare *United Constr. Workers v. Haislip Baking Co., supra*, at 875-76.

We reach a similar conclusion with regard to the loss in the amount of \$6,000 representing the replacement cost of a cable which had been purchased for use in the same construction project. After abandonment of the project the cable was left on the ground and about six months later was destroyed by a forest fire. Benedict's witness testified that the cable was not removed because it was anticipated that the construction would be resumed. Thus the loss of the cable was the direct result of Benedict's own decision, rather than the appellants' breach of contract. Moreover, the loss is so indirectly related to the strikes that it was clearly beyond the contemplation of the parties to the agreement.

⁷ The damages alleged by Benedict consisted of the following items:

(1) An increase in the cost of production of coal mined during each of the eleven months in which strikes occurred, aggregating	\$49,850.23
(2) Loss resulting from the abandonment of a construction project	21,534.85
(3) Loss resulting from the destruction of a cable by forest fire	6,000.00
(4) Loss of income incurred because of inability to process coal for other producers during the strikes	3,632.50
Total	\$81,017.68

In addition, we agree with the Unions' contention that the formula used by Benedict to calculate the amount of loss attributable to each strike, and apparently accepted by the jury, was clearly erroneous. The formula as it appears from the exhibits and testimony involved a determination of the amount by which the cost of coal produced during months in which strikes occurred was increased because of the curtailment of production and a resulting higher ratio of fixed costs to tons of coal produced. The increase in fixed costs per ton was multiplied by the number of tons which would have been produced during the month if no interruption had occurred, and the resulting amount was claimed as the loss sustained because of the strike. This formula was erroneous because it measured only increased costs rather than actual profit or loss. Benedict's own records indicated that even if production had been uninterrupted and all coal sold at the price actually received each month, a substantial loss would nevertheless have been sustained. Only to the extent that the loss was aggravated by the strikes is Benedict entitled to recovery from the Unions. Upon the present record, even if Benedict's figures are accepted as the basis for the computation, the eight strikes which could properly have been found to be in violation of the contract could have increased Benedict's actual losses by not more than \$15,866.54.⁸

Date	Actual tonnage	Actual cost per ton	Average sales price per ton	Actual sales	Actual costs	Actual loss or gain
Apr — 50	20,468.5	\$6.397	\$5.608	\$114,785.31	\$130,936.92	\$—16,151.61
Jul — 51	11,828	5.264	5.567	65,803.37	62,259.35	+ 3,544.02
Oct — 51	13,508.5	6.110	5.705	77,967.94	82,532.43	— 5,464.49
Nov — 51	14,271.4	5.729	5.798	82,745.85	81,754.47	+ 991.38
Feb — 52	16,033.6	6.130	5.492	88,064.28	98,283.03	—10,218.75
Apr — 52	16,631.4	6.083	5.370	89,317.55	101,164.67	—11,847.12
Aug 52	8,460	5.907	5.315	44,962.39	49,972.94	— 5,010.55
May 53	6,114.4	7.503	5.557	33,975.53	45,879.66	—11,904.13

Net Actual Loss \$ 56,061.25

(Continued on page 11a)

Because of these errors affecting the amount of damages Benedict was entitled to recover from the Unions, the judgment must be set aside and the case remanded for a new trial upon that issue. By reason of what we have said on this review it is possible that additional or different evidence may be introduced upon the issue of damages at a retrial. Accordingly, nothing that has been stated here should be understood as fixing a maximum allowable recovery in a second trial.

We turn now to the separate issues raised by the Trustees' appeal. The jury found that Benedict was liable to the Trustees for unpaid royalties in the amount of \$76,504.26. Determining, however, that a set off of \$81,017.68 was intended, the district court ordered that the Trustees should recover only after Benedict's judgment against the Unions was paid. Accordingly, Benedict was granted execution of its judgment with instructions that the sum be paid into the registry of the court. From this sum the Trustees were to receive \$76,504.26 and the balance was to go to Benedict. Because the Trustees' judgment was conditional, neither execution nor interest was granted. It is the Trustees' contention that this disposition was erroneous and that they are entitled to an unconditional judgment with interest for the \$76,504.26 representing unpaid royalties.

Date	Projected tonnage	Projected cost per ton	Average sales price per ton	Projected sales	Projected costs	Projected loss or gain
Apr—50	23,044	\$6.24	\$5.608	\$129,230.75	\$143,794.56	\$—14,563.81
Jul—51	13,516	5.142	5.563	75,189.51	69,499.27	+ 5,690.24
Oct—51	18,272	5.746	5.705	104,241.76	104,990.91	— 749.15
Nov—51	16,053	5.507	5.798	93,075.29	88,403.87	+ 4,671.42
Feb—52	17,635	6.008	5.492	96,851.42	105,951.08	— 9,099.66
Apr—52	18,647	5.954	5.370	100,234.39	111,024.24	—10,789.85
Aug—52	9,668	5.721	5.315	51,385.42	55,310.63	— 3,925.21
May—53	10,186	6.679	5.557	56,603.60	68,032.29	—11,428.69
Increase in Loss			\$15,866.54	Net Projected Loss		\$ 40,194.71

The heart of the Trustees' appeal lies in their contention that it was error for the district court to construe the 1950-52 agreement as making the Trustees third party beneficiaries of Benedict's promises. If the district court was correct, then defenses available against the unions were also available to Benedict as set-offs against the Trustees. In addition to permitting Benedict to set off damages resulting from breaches attributable to the Unions, the district court held that acts of individual employees of Benedict which caused damage to Benedict could be the basis for set-offs against the Trustees, even if the acts were not imputable to the Unions.

The Trustees assert that under the 1950-52 contract, title to the royalties passed to the Trustees immediately upon production of the coal. Consequently they argue that their cause of action was one to recover property held in constructive trust for them by the settlor, Benedict. If correct in these contentions, the Trustees would be immune from set-offs or claims which Benedict might have against the Unions or the individual employees.

The provision of the agreement specifically relied upon by the Trustees states: "Title to all moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust. . . ." Acceptance of the Trustees' interpretation would require the conclusion that the parties intended that the royalties become "due and owing" as soon as the coal left the ground. To thus construe the royalty provisions as being independent of the obligations assumed by the Unions would, however, be inconsistent with the agreement considered as an entirety. The 1950-52 agreement specifically provided: "This Agreement is an integrated instrument and its respective provisions are interdependent. . . ." Further, the provision requiring that the parties resort to the specified procedure

for the settlement of local disputes is stated to be "part of the consideration of this contract." Hence we conclude that the obligation to make payments to the Trustees was dependent upon performance by the Unions of their obligations, and consequently that the district court was correct in ruling that the Trustees were third party beneficiaries of the contract and subject to the defenses arising from breaches by the Unions.

We cannot agree, however, that Benedict was entitled to a set-off against the Trustees for losses resulting from acts committed by individual employees not imputable to District 28 or the International Union. The individual employees were not parties to the agreement, so their acts clearly could not amount to a breach unless the acts were imputable to a contracting party. Benedict's contention, which was accepted by the district court, was that the individual members were beneficiaries of the Fund and that since the royalty payments were for their ultimate benefit, their misconduct would *pro tanto* relieve Benedict of the obligation to make the royalty payments.

This theory overlooks the nature of the Fund and its relationship to the individual employees. Though *sui generis*, union welfare funds created under the authority of 29 U. S. C. A., § 186 (c), are similar in some respects to charitable trusts. See *Van Horn v. Lewis*, 79 F. Supp. 541, 545 (DDC., 1948); Cf. *Hobbs v. Lewis*, 159 F. Supp. 282 (DDC., 1958). As in a true charitable trust, the actual beneficiaries of this fund are not ascertainable. Present employees who are potential beneficiaries may have an "interest" sufficient to enforce compliance with statutory requirements for administration of the fund, see *Wilkins v. De Koning*, 152 F. Supp. 306 (E. D. N. Y., 1957), but it is clear that the agreement did not contemplate vesting the employees with a present "interest" in the trust *res* so as to warrant a set-off in favor of the settlor.

This was made clear by the agreement, which provided that "no benefits or moneys payable from this fund shall

be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void. The moneys to be paid into said fund shall not constitute or be deemed wages due to the individual mine worker, *nor shall said moneys in any manner be liable for or subject to the debts, contracts, liabilities, or torts of the parties entitled to such money; i. e., the beneficiaries of said Trust under the terms of this Agreement*" [emphasis added]. These restrictions upon dispersal of the trust funds were applicable whether the party seeking to assert a claim was a third party or the settlor.

The Trustees, however, were not prejudiced by the error of the district court on this phase of the case. On the cross-claim the jury found that all of the acts in question were in fact caused or ratified by the Unions. The jury's finding on the set-off must also, therefore, have been on the basis of acts attributable to the Unions rather than to unauthorized conduct of individual employees.

Since the Trustees were properly determined to be third party beneficiaries and subject to defenses arising from breaches by the Unions, the district court correctly concluded that the judgment for the Trustees, to the extent that it was subject to a set-off, was conditional and not entitled to execution and interest. However, it is evident for the reasons discussed earlier that the losses for which Benedict may be compensated will be less than the amount of the Trustees' judgment, and the Trustees will be entitled to interest and execution on that part of the judgment in their favor which is in excess of the allowable set-off.

The judgments are set aside. Case No. 13,056 is remanded solely for a redetermination, in accordance with the views expressed in this opinion, of the amount of damages Benedict is entitled to recover from the Unions. The

judgment in favor of the Trustees will then be amended by the district court to allow execution and interest on that part of the said judgment which is in excess of the set-off in favor of Benedict as so redetermined.

Nos. 13.055-56.

Miller, Circuit Judge, concurring in part and dissenting in part. I concur in the findings of the majority opinion, except with respect to some of them involving the question of damages.

The majority opinion holds that, as a matter of law, liability for damages on the part of the unions could exist only in eight of the eleven work stoppages in issue, and that it was error to permit the jury to include in its verdict damages alleged to have been caused by the remaining three work stoppages, referred to in the record as the "Water Strike," the "Collingsworth Strike," and the "Wage Stabilization Board Strike." I am of the opinion that it was proper for the jury to consider what damage, if any, was caused by each one of the eleven work stoppages, instead of only eight.

With respect to the "Water Strike" and the "Collingsworth Strike" the majority ruling is that they were spontaneous work stoppages, rather than concerted strikes resulting from a labor dispute, and consequently did not constitute violations of the 1950-52 Agreement. There was evidence that Field Representative Scroggs of District 28 told members of the local, "Boys, I can't tell you. * * * I can't tell you boys when to strike. I can't come out and tell you to strike, but when I tell you when you don't get what you want why you boys know what to do then," and that this was understood by those who knew the language to mean, "Well, we knowed, when he told us that we knowed to strike." Section 4 of the 1950 agreement provided that the United Mine Workers would exercise their best efforts through available disciplinary measures to

prevent stoppages of work by strike pending adjustment of grievances in the manner provided by the agreement. There were two or three strikes over water without disciplinary action being taken by the unions. There was evidence that Scroggs supported the position of the strikers in the "Collingsworth Strike." In my opinion, this evidence was sufficient to take to the jury the factual issue of whether these strikes were of the "wildcat" type for which the unions were not responsible or were work stoppages either instigated or ratified by the union representatives in violation of the Agreement.

With respect to the "Wage Stabilization Board Strike" in October, 1952, it is true that the issue involved was national in scope and under the Agreement was not required to be settled by the machinery provided in the "Settlement of Local and District Disputes" section. But the amended agreement, effective October 1, 1952, also provided: "The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract" and that in the case of disputes national in character "the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry," it being the purpose of this provision to settle such disputes by collective bargaining without recourse to the courts. The 1952 amendment provided for a per diem increase for the mine workers of \$1.90 a day. On October 18, 1952, the Wage Stabilization Board refused to approve more than \$1.50 of this increase. Miners throughout the country went on strike, including miners of Benedict. Under date of October 21, 1952, the President of the United Mine Workers replied to a letter received from the President of the National Bituminous Coal Operators Association, in which he wrote in part as follows: "You assert that many miners are not working. You also know that they are outraged by the attempt of the N A M ruffians to filch milk money from their purse. They are acting as individuals. They are exercising their

rights as individuals and freeborn Americans. They have not sought nor been given advice or suggestions by their Union or this writer. We have a contract. We expect your compliance with its provisions. Miners will work when you honor its provisions. If you do not like the contemptible action of the N A M labor baiters and the little Harvard professor and his quavering trio, appeal and ask for review and reversal. You are the sole petitioner and plaintiff." I do not believe that this Court can say as a matter of law that this action of the Union was not a violation of its contract obligation to "settle such disputes by free collective bargaining as heretofore practiced in the industry." The statutory concept of free collective bargaining is "the mutual obligation of the employer and the representatives of the employees to meet at reasonable times and confer in *good faith* with respect to *wages*, hours and other terms and conditions of employment, * * * " (Emphasis added). Sect. 158 (d), Title 29, U. S. Code, *N. L. R. B. v. American National Insurance Co.*, 343 U. S. 395, 409. Good faith requires an unpretending, sincere intention and effort to arrive at an agreement; it is a state of mind which can be resolved only through an application of the facts in each particular case. *N. L. R. B. v. Stanislaus Implement and Hardware Co.*, 226 F. (2) 377, 380, C. A. 9th. The Union's action in this instance could reasonably be construed as an approval of the action of the miners together with a recommendation to them that the strike continue irrespective of its purpose to compel Benedict to pay wages which would have been a violation of law on its part to pay. Although a labor union has the general right to strike for the advancement of its own economic interests, Section 163, Title 29, U. S. Code, such right does not include the right to strike to accomplish an unlawful purpose or to force an employer to act in violation of the laws or established policies of the United States Government. *United States v. Chattanooga Chapter, etc.*, 116 Fed. Supp. 509, 511, E. D. Tenn.; *N. L.*

R. B. v. Aladdin Industries, 125 F. (2) 377, 380-381, C. A. 7th, cert. denied 316 U. S. 706; *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 256. Whether the action of the Union complied with its contract obligation to "maintain the integrity of this contract" and constituted a good-faith exercise of "free collective bargaining," as also required by its contract, is a question which in my opinion should be decided by the jury, rather than by this Court. *Allied Equipment Co. v. Weber Engineered Products*, 237 F. (2) 879, 883, C. A. 4th.

I concur in the ruling of the majority opinion that it was error to permit the jury to consider the claimed loss of \$6,000.00 representing the replacement cost of a cable which was destroyed by a forest fire, but I am not in accord with its holding on the question of the amount of damages caused by the other work stoppages considered by it.

With respect to the claimed loss of \$21,534.85 resulting from the abandonment of a construction project, the evidence was that that amount was the cost of the labor and material which went into the incompleated project. The majority opinion, in rejecting this item of damage as a matter of law, treats the abandonment of the project as a voluntary act on the part of Benedict, holding that Benedict was not damaged in that it received materials and services for the entire \$21,534.85 which it expended. Such rule is not applicable, however, if the abandonment of the project was not a voluntary act on the part of Benedict. *Harris v. The Cecil N. Bean*, 197 F. (2) 919, 921-922, C. A. 2nd; Restatement, Contracts, Sect. 357 (1) (a). If the unions were responsible for the abandonment of the project, Benedict would not be chargeable with the cost of the materials and services which went into the project, but rather only with the amount of the benefit which it received from such materials and services. *Morton v. Roanoke City Mills, Inc.*, 15 F. (2) 545, 547, C. A. 4th; *In re*:

Irving-Austin Bldg. Corporation, 100 F. (2) 574, 578, C. A. 7th; *Schwabnick v. Blandin*, 65 F. (2) 354, 357, C. A. 2nd; Restatement, Contracts, Sect. 357 (3). Whether the abandonment of the project was voluntary on the part of Benedict was a factual issue in the case. There was substantial evidence on the part of Benedict that the labor trouble and pressure became so great the contractor was forced to quit, which in my opinion was sufficient to take such factual issue to the jury. There was also evidence that Benedict did not get a dollar's worth of use out of the work, that the work had not progressed to the point where it could have been used for anything, and that the investment was a complete loss. What benefit, if any, Benedict received from the partial performance of the contract, likewise seems to be a jury question.

With respect to other work stoppages, Benedict introduced evidence showing the difference between the cost per ton of the coal actually mined and the decreased cost per ton if production had not been suspended by the strikes. This increase in fixed costs per ton was multiplied by the number of tons which would have been produced during the month if production had not been suspended during the strikes, and the resulting amount claimed as the loss sustained because of the strike. I agree with the majority ruling that this formula did not correctly show the damage. It included the increased cost of production on tonnage that was not mined. With respect to tonnage that was not mined, Benedict's damage was the loss of profits which would have resulted if such tonnage had been produced and sold. Increased cost of production is only one element affecting profits. *United States v. Griffith, etc.*, 210 F. (2) 11, 14, C. A. 10th. It was not shown that this tonnage, if produced, would have been sold at a profit. It is contended that it would have been sold at a loss if it had been mined, in which event Benedict was not damaged. With respect to the tonnage that was not mined, the question of what damage, if any, was sus-

tained by Benedict by reason thereof, should have been submitted to the jury under instructions applicable to lost profits. *Yates v. Whigel Coke Co.*, 221 F. 603, 607, C. A. 6th; *Roseland v. Phister Mfg. Co.*, 125 F. (2) 417, 420, C. A. 7th. See: *Union Cotton Co. v. Bondurant*, 188 Ky. 319, 323-324.

With respect to the coal that was mined by Benedict, Benedict's damage was the amount by which its profits were reduced by the strike, or if the coal was produced at a loss, the amount by which the loss was aggravated by the strike. Increased cost of production caused by the strike was a proper element for the consideration of the jury.

APPENDIX B**Judgment**

No. 13,055

(Filed September 26, 1958)

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby set aside for amendment by the District Court in accordance with the views expressed in the opinion.

Judgment

No. 13,056

(Filed September 26, 1958)

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby set aside and the case is remanded solely for a redetermination in accordance with the views expressed in the opinion, of the amount of damages Benedict Coal Corporation is entitled to recover from United Mine Workers of America and United Mine Workers of America, District 28.

APPENDIX C**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON****GARMEDA COAL COMPANY, *Plaintiff*****vs. No. 615****INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*, *Defendants*****Filed; Aug. 5, 1954****Additional Findings and Conclusions**

This cause coming on to be heard upon the motion of the plaintiff for additional Findings of Fact and Conclusions of Law, and the Court having heard arguments presented by counsel for the respective parties and being advised sustains the plaintiff's motion and states Findings and Conclusions in addition to those set out in the Opinion filed herein on July 20, 1954, as follows:

FINDINGS OF FACT

1. The strike involved in this case was called by Jake Abbott, President of Local Union No. 6130.

2. Local Union No. 6130, in calling the strike by its President, did not act and was not authorized to act as an agent for the International Union of United Mine Workers of America or for District 19 thereof and had no authority whatever from the International Union or District 19 to call the strike or participate therein.

3. The Local Union, as such, did not sign any of the contracts alleged to have been violated and, as such, was not a party thereto.

4. The Local Union, as such, had no part in the negotiations leading up to or in the consummation of the bargaining agreement herein alleged to have been breached.

5. The International Union of United Mine Workers of America and the Local Union No. 6130 of United Mine Workers of America and District 19 thereof did not together constitute a single entity and did not bear such relation to each other that the acts of the Local were the acts of all three of them, and the act of the Local by engaging in the strike here in question was not the act of the defendant International Union or District 19 of the United Mine Workers of America.

CONCLUSIONS OF LAW

1. The relationship existing between the International Union and the Local were some what analogous to the relationship of a parent corporation to its subsidiary, but considered as a whole the relationship of the Union and the Local "is sui generis and simply will not fit into any of the traditional legal pigeonholes." *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 210 F. 2d 623, 628, C.A. 3. Such relationship is not sufficient to render the International Union liable for unauthorized acts of the Local.

2. Under the constitution of the International, the Local is in many respects an autonomous entity without power or authority to act for or bind the International in respect to calling or promoting a strike in violation of a bargaining agreement entered into by the International.

3. The Local, not having been a party to the bargaining agreement alleged to have been violated herein, is not liable for breach of such contract nor for any damages arising therefrom.

/s/ H. Church Ford
Judge.

August 5, 1954

UNITED STATES OF AMERICA }
EASTERN DISTRICT OF KENTUCKY } ss:

I, Davis T. McGarvey, Clerk of the United States District Court for the Eastern District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original ADDITIONAL FINDINGS AND CONCLUSIONS filed August 5, 1954 in the case of GARMEDA COAL COMPANY, as plaintiff vs. INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, et al., as defendants, Civil Action No. 615-London Docket now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at London, Ky. this 16th day of January, A. D. 1958.

Davis T. McGarvey, *Clerk.*

By Bessie M. Greene, *Deputy Clerk.*

APPENDIX D**Labor Management Relations Act, 1947**

29 U.S.C.A. 185, 61 Stat. 156: *Suits by and against labor organizations*

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

* * *

(c) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

29 USCA, Sec. 187: "*Boycotts and other unlawful combinations; right to sue; jurisdiction; limitations; damages*"

(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a re

fusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under subchapter II of this chapter.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. June 23, 1947, 3:47 p.m., E.D.T., c. 120, Title 14, Sec. 303, 61 Stat. 158."

29 USCA, Sec. 163: *Limitations*

Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

APPENDIX E**Constitution of the International Union****United Mine Workers of America**

Effective November 1, 1948

(Exhibit 17, Appendix 385a)

ARTICLE XVI.**STRIKES.**

Section 1. No District shall be permitted to engage in a strike involving all or a major portion of its members without the sanction of an International Convention or the International Executive Board.

Sec. 2. Districts may order local strikes within their respective Districts on their own responsibility, but where local strikes are to be financed by the International Union they must be sanctioned by the International Executive Board.

Constitution of the International Union**United Mine Workers of America**

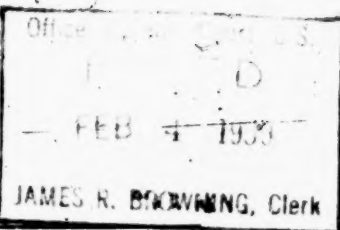
Effective November 1, 1952

(Exhibit 17, Appendix 385a)

ARTICLE XVI.**STRIKES.**

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Supreme Court of the United States

OCTOBER TERM

1959

NO. 19

UNITED MINE WORKERS OF AMERICA and
UNITED MINE WORKERS OF AMERICA,
DISTRICT 28 PETITIONERS

V. BRIEF ON BEHALF OF RESPONDENT
BENEDICT COAL CORPORATION RESPONDENT

BRIEF OF RESPONDENT IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM — 1958

NO. 563

UNITED MINE WORKERS OF AMERICA and
UNITED MINE WORKERS OF AMERICA,
DISTRICT 28 PETITIONERS

V. BRIEF ON BEHALF OF RESPONDENT
BENEDICT COAL CORPORATION RESPONDENT

**BRIEF OF RESPONDENT IN OPPOSITION
TO THE GRANTING OF A WRIT OF
CERTIORARI**

TO THE HONORABLE, THE CHIEF JUSTICE AND
THE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

Your respondent respectfully states that a Writ of
Certiorari should not issue to review the judgment of the
United States Court of Appeals for the Sixth Circuit on
the grounds assigned by the petitioners.

STATEMENT OF THE CASE

I.

Your respondent accepts the statement of the pleadings,
trial proceedings and the Sixth Circuit's judgment as set
out by the petitioners with this addition: The Sixth Circuit

also determined that three of the eleven strikes involved did not constitute violations of the contract. The Sixth Circuit also set aside certain items of damage resulting from the cessation of work by M. M. Campbell which items had been allowed by the trial court.

II.

Your respondent would add to the statement of facts concerning the various strikes:

There was a conflict in evidence during the trial on a lot of the facts concerning the various strikes. All conflicts were resolved in the appellee's favor by the jury's verdict, and we will, therefore, note the pertinent facts as shown by the appellee's evidence. These strikes covered a period from April, 1950, through May, 1953. This suit concerns eleven of the strikes but during that period of time there were many strikes, not all of which are shown as damaging Benedict (R. 680.) We are only dealing in this suit with those strikes which occurred at times when they were damaging to Benedict. Other strikes occurred at short work periods and therefore were not directly damaging. The number and the continued incidence of the strikes show a system or pattern on the part of the men in the Union to use the strike system for getting their way in case of differences with the management. Plaintiff's evidence shows that this system was suggested to the men by a field representative of the Union (R. 408a) and further that this field representative advised them that they can't come out and tell them when to strike but if they don't get what they want they know what to do and that this advice was given prior to the first strike in issue in this suit (R. 424a) Appellee's evidence also shows that District 28 or the International Union never exercised any effort through available disciplinary measures to prevent stoppages of work by strike pending adjustment of disputes

The abbreviation "R" refers to the joint appendix to the brief of appellant used in the court below and which is part of the printed certified record in this court.

(R. 216a, 411a and 412a). The defendant Unions offered no evidence to refute this and in effect admitted a breach of the 1950 agreement on that score.

The appellee tried to arbitrate all of the strikes except the one over the water shortage and were turned down. (R. 215a) Benedict's position was that each of the strikes involved in the suit was a violation of the collective bargaining agreement then in force and that two of them were further in violation of Section 303 of the Labor Management Relations Act. In each of the following numbered paragraphs we state the pertinent facts of the various strikes as shown by appellee's evidence.

(1) THE STRIKE OF APRIL 14 and 17, 1950; OR THE SENIORITY STRIKE:

When Benedict entered into the contract of March 5, 1950, they were working the No. 11 and No. 7 seams which were about to be worked out, and from those two seams Benedict was moving into No. 9 and No. 10 seams. The No. 7 seam worked out faster than was ideal and work places could not be furnished to all of the men in No. 7 and forty or fifty men had to be cut off when certain sections of the mine worked out. Those men claimed jobs in the other two seams of coal. There was a dispute over that with the men, and a strike resulted on April 14 and April 17, 1950. (R. 155a and 156a). Benedict called the Committee and the Field Representative of District 28 to come down, and a meeting was had on Saturday, April 15. At the meeting Benedict asked Scroggs to get the men back to work and to arbitrate the various grievances of the various men. Mr. Scroggs did not agree to that (R. 159a). After arguing the matter out until after dark, Benedict finally gave in and tried to place the men as nearly as possible to not hamper the efficiency of the mine. (R. 160a). To the knowledge of Mr. Darst neither Mr. Scroggs nor anyone else in the district took any disciplinary steps toward the Local members to discourage or prevent that stoppage. (R. 160a).

James Scott, a former Committeeman, testified that Mr. Scroggs, the District Representative, told them, "Boys, I can't tell you"—he says, "I can't tell you boys when to strike, I can't come out and tell you to strike, but when I tell you when you don't get what you want why you boys know what to do then." (R. 408a). On direct examination Scott didn't remember whether they were told right at that time or not but that Scroggs told him that several times. On redirect examination Scott further testified that this was previous to the lay-off strike. (R. 424a). Scott also testified that during the period from March, 1950, to September, 1952, that neither Mr. Scroggs nor any District 28 agent or officer ever punished him or his Local for striking. (R. 411a, 412a), and further that during that period they never told them not to strike. (R. 412a). Scott further testified in speaking of Mr. Scroggs or any district 28 agent or officer:

"Q. Did they ever during the period of time from March, 1950, through May 1953, tell you all to arbitrate your disputes with the company?

A. No. They just told us; the only way they told us, when we didn't get what we wanted we knewed what to do." (R. 412a)

(2) THE STRIKE OF JULY 30-31, 1951, OR THE VACATION PAY STRIKE:

Between January and July 1951 Benedict's No. 5 mine was developed far enough to close down the operation on top of the mountain. The closing down of those mines caused a cutoff of quite a number of men. Those men had been carried and had been granted credit by the company, and they were due vacation pay up through the time of their cutoff, at the vacation time in July. Vacation pay is paid the last regular payday in June before the vacation which, at the time, was a 10 day period around the 4th of July.

The company endeavored to collect some of the moneys that was owed by these individuals from the vacation pay.

not necessarily all of the vacation pay but enough of it to regain some of the money that was extended to these men on credit. This did not involve employees of Benedict but rather former employees that had been cut off due to the closing down of certain of the mines. It did not involve too many men.

A lot of the former employees, that were not in debt to the company, got their whole vacation pay. After wrangling about it through July the Benedict employees struck on July 30th and 31st and demanded that the ex-employees get their vacation pay in full. The men who struck were not the same men that had their vacation pay withheld but were the men that were still working. (R. 166a).

Benedict tried to settle the matter in two or three meetings during July at which time Mr. Scroggs was there as the Field Representative. The company asked for arbitration of the matter, but Mr. Scroggs said that the men were due all of the vacation pay in cash and also said after one of the meetings was over in Mr. Darst's hearing, "Boys, it looks like you are going to have to take this matter into your hands." Scroggs made that statement to the Committee. (R. 167a). After that statement was made, they had the strike on July 30th and 31st. Darst believed that at the time Scroggs made the statement that "This isn't a matter for arbitration. We won't arbitrate it." (R. 167a). Darst also testified that the company asked the board to arbitrate it and Mr. Scroggs politely refused to let it go to arbitration. (R. 277a). During the strike they worked out the plan of asking each individual from whom all or a portion of the vacation pay had been withheld to come in and talk individually with the bookkeepers, to see if they would give Benedict a proportion of their vacation pay voluntarily to apply against their account owing the company. Benedict collected some money that way and divided with the men, and the employees voted to go back to work. (R. 168a). This strike was necessarily after the Union's failure to discipline the men for previous strikes and to use their best efforts through available

disciplinary measures to prevent stoppages of former strikes and this strike.

(3) THE STRIKE OF OCTOBER 1-8, 1951, OR THE CREDIT STRIKE:

Prior to October, 1951, Benedict had been extending credit to a portion of the men who had been laid off from the end of February, 1951, up to that time. The company had run its string out on extending credit to those men. These were men who were marked to go into the No. 5 mine when that mine had developed to the point where Benedict could put them to work. (168a). These men were not employees but were former employees. The company told them that they could no longer stand for the \$3.00 per day per man that they were giving them, and the employees that were still working struck. (R. 168a).

"Before this strike the Mine Committee asked for a meeting. They had a meeting with Darst. (R. 280a). No arbitration was suggested at the meeting and nothing was said in the meeting that there was going to be a work stoppage. (R. 281a, 281b). The strike lasted from the afternoon of October 1 through October 8. The company had no forewarning that the strike was going to happen and, as Darst put it, "We simply asked the union, the local union, to carry those men and advance them money since the company could no longer stand the amount that was being required to keep them alive." (R. 169a). After the strike Darst met with the Mine Committee and tried to get them to arbitrate it, and their position was "You continue to keep these men on credit and we will go back to work." (R. 169a). After that the company called in Mr. Scroggs and had another meeting, and his attitude was, "Extend these men credit, and we will go back to work."

In one of the meetings the Local Union agreed to guarantee credit to the men who were waiting to be put to work and who were moving away and leaving from time to time; and with that the company began to give them credit again, and the employees went back to work. (R. 170a).

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This was necessarily after the instructions to Scott that if they didn't get what they wanted they knew what to do and after the Union's failure to discipline the men for previous strikes and to use their best efforts through available disciplinary measures to prevent previous strikes and this strike.

(4) THE STRIKE OF NOVEMBER 2, 7, 1951, OR THE ERNEST TABOR STRIKE:

Prior to November, 1951, Benedict had an employee by the name of Ernest Tabor who was a chronic absentee. This man was absent at least one-third of the time, and Benedict discharged him for chronic absenteeism. After this discharge Benedict struck one day, being November 2. After Tabor's failure to obtain employment at another mine Benedict's employees struck another day, being November 7. Benedict's employees struck because they wanted Tabor taken back to work. (R. 171a, 172a, 173a). One of Benedict's representatives testified that Mr. Clark came down on that strike, and another one testified that Mr. Scroggs came down although that witness couldn't say for sure. (R. 418a). In either event a Field Representative was down. According to Mr. Dairst the company asked to arbitrate it, but they would not do it. (R. 173a). The company took the man back to work and gave in to the Union so that they could get back to work. (R. 173a).

This was necessarily after the previous instructions given to Scott when they didn't get what they wanted they knew what to do and was after the Union's failure to discipline the Local or its members for previous strikes and after the Union's failure to use their best efforts through available disciplinary measures to prevent strikes.

(5) THE STRIKES OF FEBRUARY 7, 8 AND APRIL 24, 25, 1952, OR THE M. M. CAMPBELL STRIKES:

On August 15, 1951, Benedict entered into a contract with M. M. Campbell under which M. M. Campbell agreed to construct a certain slate disposal bin and an aerial tram

and bucket line for slate dumping. The amount of the contract was \$12,500. Benedict agreed to furnish Campbell money at the end of each week's work for the purpose of meeting payrolls and \$125.00 per week for five days or \$25.00 per working day as an allowance to cover use and maintenance of tools and services as boss. Further details of the contract are shown on pages 181a, 182a and 183a of the record.

Campbell apparently had started work a few days before the contract was executed. When Campbell started out he had his own working force of men that had worked with him on a previous job. His employees were carpenters and concrete mixers and people experienced in that kind of work. The job required skilled workers. After Campbell commenced work, Benedict had several meetings with the Benedict Committee and the District Representative, Mr. Seroggs, at which times the Committee and Mr. Seroggs insisted that Mr. Campbell hire and work several Benedict men who were coal miners and who were laid off at the time. (R. 184a, 185a). These laid off coal miners were not carpenters or other skilled tradesmen. Campbell had done some dynamiting and shooting inside a shop building to make a grease rack; and after he did that job, the Mine Committee and the President of the Benedict Local were more insistent than ever that Campbell work Benedict men and sign a United Mine Workers contract. (R. 188a). Mr. Campbell, Benedict personnel, the Local Committee and Mr. Seroggs had a meeting over this on or about January 15, 1952. The purpose of the meeting was to try to resolve the question of whether or not Mr. Campbell would work Benedict men or not. At the meeting Mr. Seroggs made the statement that if the mine worked, Benedict men were going to have to work on the Campbell working force. At that time Mr. Campbell apparently did not have a contract with the United Mine Workers. (R. 187a). At this meeting there were some words passed when Ellis Lynn called Campbell a worker of scab labor. (R. 188a). Mr. Campbell's reaction was very violent. Mr. Campbell did not do what the Union told him to do, and on the afternoon of February

7 and on February 8 Benedict had a strike. (R. 189a). Benedict had been told by Mr. Seroggs that the Benedict mine would not work unless Mr. Campbell signed a contract for his men to belong to the United Mine Workers. (R. 292a). The men went back to work and Benedict had a half day strike in March over Mr. Campbell and another strike in two days of April, 1952, being April 24 and 25. (R. 190a). The April strike was over still not working Benedict men and over Campbell's men not being taken into the Local Union after Campbell went to Norton and signed a contract.

Mr. Campbell also testified in the case and, among other things, stated that he had in his employ sometimes three or four and sometimes six or seven men. That he did the hiring and he had the right of discharge. (R. 331a). That the mine workers wanted him to hire the men that had been in their Benedict Local and that they said that his men should belong to the Union. (R. 333a). That he had a considerable bit of trouble about this and on one occasion one of the group getting ready to go into the pit threatened to roll his truck over the hill. (R. 334a, 335a). That seemingly they had a boss somewhere because when they would come to tell him, "We are going to strike Mr. Darst's mine and the boss told us we knowed what to do." That Mr. Scott most of the time approached him, and he would say, "We are going to blow it out tomorrow." (R. 335a).

Campbell further testified that the idea was to make him sign a United Mine Workers contract, which he finally did, as if he were a coal operator, not a construction worker. (R. 336a). Campbell testified he attended a meeting prior to a February strike in Mr. Darst's office and that Mr. Seroggs, a Field Worker of District 28, was down there. That at that meeting Seroggs told Mr. Scott, "If you don't get what you want, you know what to do." (R. 339a). That at the meeting the main idea was to get him to work Benedict men and that something was said about him signing the contract. (R. 339a). That it was made very plain by Mr. Seroggs if he didn't sign a United Mine Workers contract, quoting "Mr. Seroggs looked at Mr.

Jim Scott and said "If we don't get what we want, you know what to do." (R. 339a, 340a).

There was further testimony by Mr. Campbell that he finally signed the United Mine Workers Contract and that there was a half day strike there. That when he agreed to go with a Committeeman and the president of the Local to District 28 and sign the contract, they gave the go ahead sign to work. (R. 340a).

Mr. Campbell further testified that he went to Norton to sign the contract and when there the District President, Mr. Condra, stated, in Campbell's words: "I did sign it, and the president, Mr. Condra said, 'I had the damn son-of-a-bitch blowed out'. That was the Benedict blowed out, if I hadn't signed the contract." (R. 341a). That in mine parlance the expression "blow out" means the calling of a strike. (R. 342a). Campbell further stated that he had more strikes. That Mr. Scott and Mr. Grant Mullins would see him and say, "The boss sent us here to shut you down if you don't do something." (R. 344a). That he did not take the coal miners on his payroll because he couldn't use them and that he had strikes at a later date. (R. 344a). Campbell had interference after he signed the contract with his men going to work. (R. 345a). After Campbell signed the contract, Mr. Scott wanted him on a Saturday to bring his men down to the Local to join. He got his men together and went to the Local, but the Local would not take them in for the reason that the Local had men laid off. That he quit in August.

The Campbell strikes were necessarily after the previous instructions had been given to Scott that if they did not get what they wanted they knew what to do and after the previous failure of the Union to discipline its employees for strikes and to use their best efforts through available disciplinary measures to prevent strikes.

(6) THE STRIKE OF AUGUST 5-6, 1952, OR THE ANDERS ROARK STRIKE:

In August, 1952, Benedict had two employees by the

names of Anders and Roark. These men carelessly applied the power to a locomotive without anybody being on the locomotive before checking it to see if the control was taken off and when the power was applied, the locomotive started up by itself, unattended, and plunged off a 20 or 30 foot embankment into the creek and took several mine cars along with it. Although Anders and Roark were not trackmen, they had been given that job and had been working at it from time to time before. Anders admitted in his testimony that he did not know whether Roark was at the locomotive when he turned the electricity on but that he gave him plenty of time to get there and that he never asked him why he didn't get there. (R. 633a, 634a). Anders admitted he had used the motor to haul steel for track material before and he knew how to run one and had experience with motors of that type. The men were discharged for their negligence and on the 5th day of August everybody was on strike because of the discharge. (R. 173a, 174a). Mr. Clark, the Field Representative, came down, and his position was that Benedict had to give these men back their jobs and had no right to fire them. Clark did not agree to arbitrate it. The strike was resolved by the company giving in again and agreeing to put the men on some other work. The company made a job for them to put them back to work so that the mine could go back to work.

A grievance was later had as to whether or not the two men were due back pay, but this was after the strike was over.

This strike was necessarily after the instructions to Scott that if they did not get what they wanted, they knew what to do and was necessarily after the Union's failure to discipline the men for previous strikes and to use their best efforts through available disciplinary measures to prevent stoppages of former strikes and this strike.

(7) THE STRIKE OF MAY 18-27, 1953, OR THE BIG MOUNTAIN COAL COMPANY STRIKE:

In the spring of 1953 Benedict leased to Ura Swisher two

upper seams for stripping recovery around the contour crop line of the seam. Swisher moved in in April and was ready to run coal about May 1. Swisher had about 20 employees who were not members of the United Mine Workers. He had large steam shovels, bulldozers and a giant boring machine that bored into the seam of coal. He and his workers had to go by the Benedict Coal Corporation in order to get up to his operation. About the time Swisher was getting ready to run coal Guy Darst, Dexter Rains and Ura Swisher went to see Allen Condra, the president of District 28 in his office in Norton, Virginia. At the time Swisher's employees were willing to join the United Mine Workers but they wanted a Local of their own. At the meeting Mr. Condra flatly refused to let the Big Mountain Coal Company have their own local. (R. 195a, 196a.)

According to Guy Darst at that meeting Condra also stated, "You are going to have an awful lot of trouble down at Benedict out of the Benedict men if you don't sign this contract." (R. 197a).

At the time of the meeting the name of the Big Mountain Coal Company had not been chosen, and Mr. Swisher offered to go ahead for a few days until his attorneys had picked a name, to pay dues, pay welfare, and pay Union scale, and sign the contract when the name had been chosen. Mr. Condra advised him he couldn't operate that way and that he would have to sign a contract right here. To that Swisher said, "Damn it, if you can't trust me for a few days, I can't trust you. We'll operate anyway." (R. 197a, 198a). After Swisher made that remark Mr. Condra said, "We will do everything in our power to keep you from operating." (R. 198a). There was apparently an agreement on Swisher's part at that time to sign a contract when a name had been chosen provided his employees got their own Local, and Swisher later signed a contract on that condition. Before the meeting broke up, Condra stated, "I'm the man that decides whether or not you get your own separate Local or whether those men go to the Benedict Local." (R. 198a). The contract was signed and sent

back May 14, and a letter accompanied the contract setting forth the condition. (R. 457a). After that the Benedict mine came out on Strike on May 18 and 25 or 30 of the Benedict men formed a picket line in the middle of the road which was the access road to Mr. Swisher's operation. This picket line closed down Swisher's operation. (R. 199a). Benedict stayed down until May 27. Benedict's men were apparently willing to come back to work before then, but Darst was not notified until up to the middle of the week beginning May 18. Benedict, however, waited until the 27th or 28th to go back to work because they had lost by the strike a lake order to the Great Lakes. They did not fill the order because the men were on strike and they could not produce the coal in time enough to meet the boat, and they did not get other business to resume operations in the No. 5 mine up until the following week. (R. 199a, 200a, 202a). During this time Big Mountain was not operating because they were being picketed by the Benedict men and kept from going to work. Benedict's strike ended simultaneously when they got another lake order and with the ending of the Benedict strike against the Big Mountain Coal Company to force the Big Mountain employees into the Benedict Local. Mr. Swisher got an injunction against the Union to prevent them from picketing him. (R. 202a, 203a).

On May 20 Guy Darst had sent John L. Lewis a letter advising him that he intended to hold the Union responsible for damages. At the time of the strike no one had told Guy Darst that his failure to pay royalties was the reason for the strike. (R. 203a, 204a).

Most of the above statement is based on the testimony of Guy Darst. Dexter Rains also testified about this strike and, among other things, testified that at the meeting with Condra which he attended, that Condra advised Swisher that if he did not sign the contract that he was afraid he would have trouble with the Benedict men. (R. 439a, 440a). He further testified that Condra said they would have trouble out of the Benedict men which he was afraid in turn would cause Benedict some trouble and that Condra would see the contract was signed. (R. 440a). He further

testified in response to a question as to what Condra stated, "Yes, sir, that they would see the contract was signed, that we would not work." Rains also testified that a strike followed the disagreement and that the issue was because the Big Mountain Coal Company did not have a contract with the Union and that there was an issue about whether or not the contract would be that Big Mountain employees would belong to the Benedict Local.

Ura Swisher also testified in the case. He stated that his men were willing to join the Union if they could get a Local of their own and that their men asked him to represent them and get a Local of their own. (R. 454a). He also quoted Mr. Condra as saying as best set out by copying from the transcript:

"Q. What did Mr. Condra say about that?

A. Mr. Rains and Mr. Darst and myself drove up to Mr. Condra's office and laid the card on the table to him, and he said we had to join the Benedict local, that he did not want two locals in the same mine, and we refused on the contract and he still insisted we had to join the local and he had the control of that.

Q. Did Mr. Condra make any statement as to what would happen if you did not sign according to his terms?

A. He said if we didn't sign up with him, with the Benedict local, we would have trouble with the Benedict local, the union, and everybody else in the Benedict mine would be down, and he said he had control of it. He requested me to sign the local.

Q. Did he state what would happen in the Benedict local if you did not sign?

A. He said there would be a strike until it was settled. He said we wouldn't be working, that was Mr. Condra's own mouth. (R. 454a, 455a).

Mr. Swisher did not sign a contract that day but later signed three copies of the contract and returned them to

Mr. Condra by letter of May 14, 1953. In his letter he stated that he signed the copies on condition that his employees be granted a separate Local Union charter. (R. 457a). After he signed the contract and sent it to Mr. Condra, they had a strike on the Benedict property, several employees of the Benedict Local refused to let Swisher's men go on the mountain and formed a picket line. (R. 458a). Swisher gave the reason for the strike at the Benedict mine was because, "The idea of the strike was to sit on there without a contract is the way I understand it." (R. 459a). The Benedict people refused to let his men go to work, and Swisher went to court and got an injunction against the Union. (R. 469a). After this injunction order was obtained, Swisher's men went back to work. (R. 460a). After the injunction Swisher's men apparently got a separate Local. (R. 463a).

ARGUMENT

Your respondent will follow the same order of argument as contained in the petition.

I.

The petitioners appear to argue that since previous no strike clauses that were contained in contracts prior to the 1950 contract were eliminated from the 1950 agreement, that the use of a strike to settle a dispute cognizable under the arbitration terms of the 1950 agreement was not a breach of the contract. It is our position that the abolition of the "no strike" provisions contained in previous contracts do not ipso facto give a contractual license to strike if the strikes are used to settle disputes cognizable under the settlement of dispute section of the 1950 and 1952 contracts. To hold otherwise would be to hold the contractual provisions regarding the settlement of disputes meaningless. The Sixth Circuit correctly analyzed the history of the contract and the meaning of the arbitration clause in this part of its opinion:

"With all respect for the majority view expressed in the latter decision, we agree with the dissenting

judge in that case, and with the decisions in the **Haislip** and **Mead** cases, that a strike to settle a dispute which a collective bargaining agreement provides shall be settled by an exclusive and obligatory alternative procedure constitutes a violation of the agreement.

This conclusion does not make meaningless the express abrogation of a no strike clause in the 1950-52 agreement. The right to strike was preserved with respect to all disputes not subject to settlement by other methods made exclusive by the agreement. Moreover, the Unions remained free from liability for spontaneous or "wildcat" strikes. Such spontaneous strikes would be the kind of "stoppages" and "suspensions of work" which the agreement made subject to the settlement procedure therein provided."

The Sixth Circuit also correctly held that the decisions in the **United Construction Workers v. Haislip Baking Company**, 223 Fed. 2d, P. 873, and **W. L. Mead, Incorporated v. International Brotherhood of Teamsters**, 230 F. 2d, 576, were controlling in this point.

In the **Haislip** case a contract containing similar provisions for the adjustment of disputes was involved. The Court in that case correctly held:

"It is argued that a strike could not constitute a breach of contract which did not contain a no strike clause; but we think it clear that the purpose of the contract was to require the settlement of disputes and grievances by a procedure which would not cause the disruption of business that would necessarily result from a strike and that a strike without following such procedure was necessarily a breach. See **Hazel-Atlas Glass Co. v. N.L.R.B.**, 4 Cir., 127 F. 2d 109; 31 Am. Jur. 1954 Cum. Supp. p. 174, Sec. 198.5, note 2 A.L.R. 2d p. 1287 and cases there cited."

A more recent case involving damages for breach of contract is **Teamsters, Local 25 v. W. L. Meade, Incorporated**.

ated, 230 Fed. 2d 576, decided by the United States Court of Appeals, First Circuit, on March 6, 1956. This case held:

"Notwithstanding the absence of a specific no-strike clause, the district court ruled as a matter of law that the arbitration article of the agreement, providing that the machinery there set forth 'shall be the exclusive means of adjudicating all matters,' was unambiguous and 'that its meaning was that there should be no strike as to any matter appropriate under the agreement to be arbitrated, at least while the employer was not in default as to its own observation of the arbitration requirements.' We agree with this conclusion. We also agree with the district court that the parol evidence of the negotiations leading up to the signing of the agreement, so far as such evidence was credited by him, and assuming that it might properly be considered, 'does not lead me to any different conclusion from the one I have already reached without it, and on the whole tends to support it.'"

The plaintiff's evidence also clearly showed that the Union did not exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike pending adjustment of disputes. (R. 160a, 411a, 413a). This was not contradicted by any of the union's evidence. The petitioners were clearly in default on this obligation in the 1950 contract. At this stage of the case, all of the strikes but one are governed by the provisions of the 1950 contract and only one, being the strike of the Big Mountain Coal Company, is governed by the 1952 agreement. Under the 1952 agreement, it was still a violation of the contract to use a strike for the settlement of disputes and both parties agreed that all disputes should be settled by the machinery provided in the contract. In the 1952 contract, both parties still agreed to maintain the integrity of the contract.

II.

The Circuit Court of Appeals correctly held that District

28 and its agents were agents of the International Union with respect to the activities involved and the plaintiffs' evidence showed that the strikes were instigated by Field Representative Scroggs. The record shows the duties of Field Representative Scroggs:

"Q. What were your duties as a field representative?

A. Well, in my duties as field worker, I handled grievances for the organization, trying to settle disputes that arose between the local unions and the coal companies.

Q. And your work of that type covered these 28, whatever number of operations there was, 15, 20, or 28, in your particular area of the District 28?

A. That's right.

Q. Was the Benedict operation within your such field?

A. It was.

Q. As I understand this record, you were not there all the time. A little bit of the time there was a man by the name of Clark who was there, maybe somebody else —

A. That's right. From 1952 on Mr. Clark was there.

Q. You were the field agent in 1950 and 1951 and part of 1952 that generally looked after complaints, trouble and so on, with reference to Benedict, were you not?

A. That's right." (R. 571a).

The third step of the grievance procedure as contained in the contracts provided that an earnest effort shall be made to settle such differences immediately . . . "(3) through district representatives of the United Mine Workers and a commissioner representative (where employed) of the coal company." (R. 105a).

The Field Representative was acting within the scope of his employment. His actions constituted a refusal and a repudiation of the Union's obligations to use the con-

tractual provision for adjudication of strikes. The Union can act only through such Field Representatives or through officers. The job of the Field Representative was to help settle disputes. A purpose of the Union was to assist the men in adjusting their disputes. If they misused this purpose, the Union is liable. In this case, it was clearly the plan and purpose of the Union to run over the company with these strikes and in that manner force their demands upon the company.

We do not entirely agree with the Haislip case as cited by the plaintiffs, but we will note that Judge Parker stated that they were not dealing with a case where circumstantial evidence points to instigation of strikes by defendants or the agents who represented them. In this case, the system of strikes was instigated by the appellant's Field Representative.

We would also again refer the court to the case of Teamsters, Local 25 v. W. L. Mead, *supra*. In that case, a dispute arose because an employee was "grouned." The business agent refused to arbitrate the matter and called the men out on strike. It was not an organizational matter. There was apparently no question of his authority to bind the Union. See also United Electrical Radio and Machine Workers of America, et al. v. Oliver Corporation, 295 Fed. 2d 376.

Appellants attempt to argue that the International union is not responsible for the acts of the field representative or officers of the district. The organization of the United Mine Workers was shown by the requests for admissions read in this case and by the constitution filed as an exhibit. Under the constitution the international union is composed of workers eligible for membership in the United Mine Workers, and it is divided into districts, subdistricts and local unions. District 28 is a provisional district, and district officers are appointed by the international president. Mr. John L. Lewis, Provisional District 28 is a mere division of the international union. When the field representative was working on disputes or local troubles, he was

doing work provided for by the contract agreed to by the international union. See R. 365a to 372a for further evidence of control of the District by the international union.

The Coronado Coal case is no precedent here. It was decided many years before the Taft-Hartley Act of 1947 which provides, among other things (29 U.S.C. 185):

(b) "Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the Courts of the United States. Any money judgment against a labor organization in a District Court of the United States shall be enforceable only against the organization as an entity and against its assets; and shall not be enforceable against any individual member or his assets."

(c) For the purpose of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Passage of the Taft-Hartley Act followed within a few months the decision of the United States Supreme Court in the case of Brotherhood of Carpenters v. United States (1917), 330 U.S. 395. The decision which involved section 6 of the Norris-LaGuardia Act (29 U.S.C. 106) contained this language (330 U.S. 403):

"We hold that its purpose and effect was to relieve organizations, whether of labor or capital, and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of

the organization, without clear proof that the organization or member charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration."

The purpose of the above quoted provisions of the 1947 statute, according to Senator Taft, was "to apply the ordinary rules of law of agency to labor organizations, notwithstanding resolutions on their part disclaiming responsibility for the action of persons who, in reality, are acting in their behalf." (See *United Construction Workers v. Haislip Baking Co.*, 4 Cir. (1955), 223 F. (2d) 872, 878.

The Haislip decision quotes the following excerpt of a statement made by Senator Taft to the Senate, reported in 93 Cong. Record, p. 7001, *Legislative History of Labor Management Relations Act*, Vol. 2, page 1622 (23 F. (2d) 818, 879):

"It is true that this definition was written to avoid the construction which the Supreme Court in the recent case of *United States against United Brotherhood of Carpenters* placed upon Section 6 of the *Norris-Latuardia Act* which exempts organizations from liability from illegal acts committed in labor disputes unless proof of actual instigation, participation, or ratification can be shown. The construction of the Supreme Court placed on this special exemption was so broad that Mr. Justice Frankfurter, speaking for the dissenting minority, pointed out that all unions need to do in the future to escape liability for the illegal actions of their officers is simply to pass a standing resolution disclaiming such responsibility. The conferees agreed the ordinary law of agency should apply to employer and union representatives. Consequently, when a supervisor acting in his capacity as such, engages in intimidating conduct or illegal action with respect to employees or labor organizers his conduct can be imputed to his employer regardless whether or not the company officials ap-

proved or were even aware of his action. Similarly union business agents or stewards, acting in their capacity of union officers, may make their union guilty of an unfair labor practice when they engage in conduct made an unfair labor practice in the bill, even though no formal action has been taken by the union to authorize or approve such conduct."

The petitioners cite the case of *Garmeada Coal Company v. International Union, UMW A.*, 122 Fed. Supp. 512, 230 Fed. 2d 945. In reading the latter opinion, we find that the per curiam decision expressly states that there was no proof that the international field agent instigated or incited the strike. Therefore, that case would not be controlling here. The Sixth Circuit clearly stated the applicable law in this portion of their opinion in this case:

"The jury were properly instructed that the Unions were responsible for the acts of their representatives only if the latter were engaged within the scope of their employment or authority, but that actual authorization of specific acts was unnecessary. 29 U.S.C., § 185(c). Moreover, the fact, if it is so, that field representatives of the District lacked actual authority to call strikes is not controlling. These representatives were sent by the District to attempt to settle local disputes at the Benedict mine. The declarations attributed to Seroggs all took place while he was on these missions. The calling of a strike was clearly one way to "settle" a labor dispute, although a way not permitted by the agreement. Consequently the jury were amply justified in finding that Seroggs was acting within the scope of his employment when he made the declarations in question. Compare, *United Mine Workers v. Patton*, 211 F. (2d) 742 (4 Cir., 1954), with *Garmeada Coal Co. v. International Union*, 122 F. Supp. 512 (E. D. Ky., 1954), *aff'd*, 230 F. (2d) 945 (6 Cir., 1956)."

III.

In Paragraph 3 under petitioners' heading "Reasons for

Granting the Writ," the petitioners attack the sufficiency of the evidence which sufficiency has been upheld by the trial court and by the Sixth Circuit. We have already noted the evidence in the statement of facts portion of this brief. It was clearly sufficient. Not only was there the evidence of Scott, but there was the corroborating evidence of Guy Darst and M. M. Campbell.

M. M. Campbell testified in regards to a meeting held in January, 1952:

Q. What if anything was said to you by Jim Scott on that occasion? I will use him to start with. What did he say to you about it? Mr. Seroggs, what was said:

A. Mr. Seroggs told Mr. Scott, "If you don't get what you want, you know what to do." (R. 339a)."

Guy Darst also corroborated Scott in Darst's testimony about the vacation strike. (R. 167a):

A. I believe so, yes. We asked for arbitration of that.

Q. What did Mr. Seroggs say as to that?

A. Mr. Seroggs said these men are due all of their vacation pay in cash, and he also said after one of the meetings was over, within my hearing, "Boys, it looks like you are going to have to take this matter into your hands."

Q. Who was he talking to at that time?

A. He was talking to the committee, your mines?

A. We had the strike. I believe the meeting was the Saturday preceding the Monday and Tuesday which are the 30th and 31st.

Q. Was that matter arbitrated, that strike arbitrated?

A. No.

Q. Did Mr. Seroggs at that time make any statement

about whether or not it was a matter for arbitration?
 A. Yes, he did. I believe he said that "This isn't a matter for arbitration. We won't arbitrate it".

There is also the uncontradicted evidence of a violation of the 1950 agreement by the failure of the unions to use their best efforts through available disciplinary measures to prevent work stoppages. (R. 216a, 411a and 412a).

The petitioners then argue that neither the vacation pay dispute, the credit dispute, nor Campbell or Big Mountain disputes were cognizable under the agreements. The settlement of local and district disputes Section of both contracts provides as follows as to the types of disputes to be settled under the machinery of the contract:

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately." (Bold Face ours).

All of the disputes in issue were cognizable under the contract.

IV.

The petitioners then claim that it was error to permit Scott to answer the question: "What did you understand him to mean when he said 'You know what to do'?"

James Scott testified in various places that Scroggs told him, "If you don't get what you want, you know what to do." (R. 408a, 412a, 414a, 418a, 419a, 423a, 424a). Scott also testified what he understood this to mean and it was proper to allow it. (R. 409a). We should consider a little more of the testimony than was set out in Appellants' Brief. (In the Record, Page 408a):

"Q. Now you spoke of Mr. Scroggs. During the time of that strike or disturbance, did he confer with you

or any member of the local that you know of?

A. He did.

Q. What did he tell you?

A. Well he told us, he says, "Boys, I can't tell you"—he says, "I can't tell you boys when to strike. I can't come out and tell you to strike, but when I tell you when you don't get what you want why you boys know what to do then."

It was apparent that Scroggs wanted them to know that these words had a different or special meaning. If we look in 20 Am. Jur., Evidence, Section 825, we find this:

"Where the words spoken or the actions taken have a doubtful, ambiguous, or hidden meaning, the person who used the words may not only testify as to his meaning, but all persons who heard the words spoken may testify as to what they understood the speaker meant by the use of such words."

The words of Scroggs definitely had a hidden meaning and Scott's testimony was clearly admissible.

V.

As noted by the Sixth Circuit, it was unnecessary to consider whether the M. M. Campbell Strike or the Big Mountain Coal Company strike were violative of Section 303 of the Taft-Hartley Act because the jury, in its verdict, decided that these strikes were violations of the contract. However, there was sufficient evidence as to these strikes to submit the question to the jury as to whether they were violative of the Secondary Boycott Divisions of the Taft-Hartley Act.

(1) The M. M. Campbell Strikes:

There was evidence noted in our Statement of Facts that after a certain dynamiting job was done by Campbell, the Mine Committee and president of the Benedict Local were insisting that Campbell work Benedict men and sign

a United Mine Workers contract. Benedict had been told by Mr. Scroggs that the Benedict mine would not work unless Mr. Campbell signed a contract. Campbell testified as to his trouble, that the idea was to make him sign a United Mine Workers contract, which he finally did, as if he were a coal operator and that at the meeting in Darst's office in January that something was said about his signing the contract and that it was made very plain by Mr. Scroggs what would happen if he didn't sign a United Mine Workers contract. There was evidence that the men struck in February because Campbell didn't do what the Union requested, and Campbell testified that when he agreed to go with a Committeeman and the Local president to sign the contract that they gave the go ahead sign to work. Campbell further testified that Condra stated that he had the Benedict "blowed out" if he hadn't signed the contract. This evidence clearly shows a breach of that portion of the Labor Management Relations Act in Title 29 U.S.C.A. Section 187:

(a) "It shall be unlawful . . . for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to . . . work on any goods . . . or to perform any services where an object thereof is

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees.

(2) The Big Mountain Strike:

The evidence clearly showed that the district president threatened that if Swisher didn't sign up with him, with the Benedict Local, that everybody else in the mine would be down and that the district president had control over it. (R. 197a, 198a). (R. 454a, 455a). When Swisher returned the contract on Swisher's condition and not according to

Condra's terms, the strike followed. (R-198a). The evidence clearly showed that the strike was called for the purpose of making Swisher sign the contract on Condra's terms.

It is undisputed that Swisher was a lessee of Benedict. Swisher formed his own corporation. Swisher had his own employees. Benedict and Big Mountain were clearly separate employers.

CONCLUSION

Your respondents, therefore, insist that for reasons herein discussed, a Writ of Certiorari should not issue for grounds assigned in the petition.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM

1958 **19**

NO. ~~17~~ **18**

JOHN L. LEWIS, CHARLES A. OWEN
and JOSEPHINE ROCHE, as Trustees of
the United Mine Workers of America
Welfare and Retirement Fund

PETITIONERS

V.

BRIEF OF RESPONDENT IN
OPPOSITION TO THE GRANTING
OF A WRIT OF CERTIORARI

BENEDICT COAL CORPORATION

RESPONDENT

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IN THE
Supreme Court of the United States

OCTOBER TERM

1958

No. 562

JOHN L. LEWIS, CHARLES A. OWEN
and **JOSEPHINE ROCHE**, as Trustees of
the United Mine Workers of America
Welfare and Retirement Fund **PETITIONERS**

V. **BRIEF OF RESPONDENT IN
OPPOSITION TO THE GRANTING
OF A WRIT OF CERTIORARI**

BENEDICT COAL CORPORATION RESPONDENT

**TO THE HONORABLE, THE CHIEF JUSTICE AND
THE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:**

Your respondent respectfully submits that a writ of certiorari should not issue to review the judgment of the United States Court of Appeals for the Sixth Circuit on the grounds assigned by the petitioners.

QUESTION PRESENTED

Your respondent does not accept the statement of the question presented by the petitioners and states the following as a counter-statement of the question involved:

Can the Benedict Coal Corporation use the same defense against the Trustees of the Welfare Fund that it could use against the defendant Unions, when an action is brought against Benedict by the Trustees to recover money

allegedly due and owing the trust fund, when the trust fund is created by an integrated contract instrument whose respective provisions are interdependent and when Benedict among other things, agrees to pay certain money into the fund in return for the agreement of the defendant Unions to use certain contractual provisions for the adjustment of disputes and (for a part of the period involved) for their further promise to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances, when an alleged breach of these agreements by the defendant Unions impair the ability of Benedict to pay into the fund.

STATEMENT OF THE CASE

Your respondent would supplement and correct the Statement of the Case as set out by the petitioners in these regards:

The 1950 and the 1952 agreements had the following provisions:

"INTEGRATED INSTRUMENT"

"This Agreement is an integrated instrument and its respective provisions are interdependent and shall be effective from and after March 5, 1950" (R. 107a)

The 1950 contract also had provisions for the settlement of local and district disputes. It further provided:

"3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore

"R" refers to the printed record

known and practiced in the industry.

4. The United Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement." (R. 106a)

The 1952 agreement eliminated Clause 4 above and amended subsection 3 to read as follows:

"3. The United Mine Workers of America and the operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts." (R. 113a).

In its answer filed to the original action brought by the trustees, Benedict denied liability for the sum sought on several grounds which we consider material to the question presented to this court. The pertinent part of Benedict's answer to the original complaint was as follows:

"It is true that the Defendant has not paid to the Plaintiff the alleged royalty for all of the tons of coal produced, but Defendant states that during the last five years it has been operating under a contract with the United Mine Workers of America and that the United Mine Workers of America has repeatedly broken this contract to Defendant's damage. The United Mine Workers of America has

had numerous unlawful strikes, has refused to arbitrate differences, and this refusal has caused a number of unlawful strikes and these Defendants have been unable to pay the alleged royalties because of the damages suffered by reason of the breach of the contracts by the United Mine Workers of America. That the details of said breaches will be set out in supplemental pleadings and in a cross-claim or counterclaim to be filed in this cause. That during the period of Defendant's operation under contracts with the United Mine Workers of America, the said United Mine Workers of America has caused strikes to be held at Defendant's mines which amounted to secondary boycotts as prohibited by the Labor Management Relations Acts and which strikes further damaged Defendants and made them unable to pay the welfare royalty to the Defendant by the said secondary boycotts, details of which will be hereinafter set out. That the Plaintiff in this action being the beneficiary of a contract entered into between the Defendant and United Mine Workers of America is bound by all the defenses that this defendant may assert against the United Mine Workers of America by its breaches of contract and by its secondary boycotts has damaged Defendant and made Defendant unable to pay its welfare payments, the Plaintiff in this action is not entitled to recover anything. Furthermore, the United Mine Workers of America is indebted to the Defendant in an amount in excess of any sum that this Defendant may be indebted to the Plaintiff." (R, 18a, 19a).

It was the position of Benedict that the obligation by Benedict to make payments to the trustees was dependent upon performance by the United Mine Workers and District 28 of their obligations to Benedict and that the trustees, being third party beneficiaries of the agreement, were subject to the defenses arising from the conduct of the United Mine Workers of America and District 28.

ARGUMENT

We will follow the same order of argument as contained in the petition for certiorari.

1. C

The petitioners argue that the thrust of the court's reasoning and judgment is to jeopardize the stability of all trusts resultant from collective bargaining, and consequently to be deprivative of welfare and pension benefits relied upon by employee beneficiaries of such trusts. We understand the court's reasoning and judgment to be based upon basic principals of contract and we insist that to require the contracting parties to be bound by basic contractual principals is not to jeopardize the stability of any such trusts. The large number of persons covered by welfare and retirement pension benefits is no reason to depart from fundamental principals of contract.

In Paragraph I of their argument, the petitioners argue that the court made a fundamental error in considering the trustees in this action as third party beneficiaries to the agreements. The Sixth Circuit was fundamentally sound in this finding. The trust fund involved was created by the contract between Benedict and the Union. The provisions of this contract are interdependent. It is fundamental that Benedict's obligation to pay royalties into the fund is dependent upon the performance of the obligations incurred by the other contracting parties, the International Union and District 28.

The petitioners then argue that the unpaid royalties are trust property and that such trust property in the hands of Benedict became impressed with such trust upon the production of coal from which the obligation is computed. However, in this premise they ignore the fact that no obligation rests on Benedict to pay into the fund unless the Union has fulfilled its contractual duties.

Petitioners cite *Lewis v. Quality Coal Corp.*, 243 F. 2d 769. However, in that case the court expressly stated that the title of plaintiff's and their right to recover the money is not controverted. That is not the situation in the instant case.

The petitioners further argue that the court of Appeals

conclusions that Benedict's "obligation to the trustees was dependent upon performance by the Unions of their obligations" and therefore the Trustees were third party beneficiaries, "subject to the defenses arising from breaches by the Unions" are evisceratory of the trust agreed to by the agreements employer-settlers, including Benedict.

In this argument, as in other arguments, petitioners consistently ignore the plain wording of the contract that "this agreement is an integrated agreement and its respective provisions are interdependent." (R. 107a).

Respondent's position is simply that the contract means what it says when the provisions were made interdependent.

Continuing to ignore this portion of the contract, petitioners then argue that Benedict's obligation to deliver to the trustees the trust property is a transaction wholly separate from situations upon which Benedict's claims against United Mine Workers and District 28 are predicated. We again insist that the contract merely means what it says when it states that the provisions are interdependent. Benedict's obligation to pay royalties to the trustees is not wholly separate from the obligations of the other contracting parties to abide by the contract.

The fundamental law of contract and trust sustains the ruling of the Sixth Circuit.

THE PERTINENT LAW

THE PRINCIPLES OF CONTRACT APPLY TO THIS CASE.

The Fund is created by contract. The promises are interdependent. No obligation rests on Benedict to pay into the Fund unless the Union has fulfilled its contractual duties. No money was or is due and owing the Fund by Benedict if the Union damaged Benedict to a greater extent by the Union's breach of the contract. We cannot get away from the principles of contract in this case.

In Restatement of the Law of Trusts 1935 Edition, Volume 1, page 63:

"No consideration is required for the creation of a trust (see S 28, 29). If, however, the settlor does not manifest an intention to create a present trust, but only manifests an intention to create a trust in the future, no trust is currently created, and he is not bound later to create the trust, unless the requirements for the formation of a contract are complied with (see S 30). The result is the same where, although the settlor uses language of present conveyance, he is not yet owner of the property which he purports to convey. The creation of a trust is a present disposition of property, and not an undertaking to make a disposition in the future."

And further in Comment a. to Section 75, Restatement of Trusts on page 225:

a. "Interest which has not come into existence. An interest may be not in existence because the thing which would be the subject matter of the interest is not in existence, or because although the thing is in existence no one has an interest in it. In such cases no one has an interest in the thing of which he can declare himself trustee or which he can transfer to another in trust. A person can, it is true, make a contract binding himself to create a trust of an interest if he should thereafter acquire it; but such an agreement is not binding as a contract unless the requirements of the law of Contracts are complied with (see Comment b)."

The appellants argue that unpaid royalties represent trust property in the hands of Benedict and that such property became impressed with the trust upon the production of coal from which the obligation is computed. In making this statement appellants assume that the royalties are due and owing. This is an erroneous assumption.

"S" denotes section

tion since the jury found that the other contracting party, the Union, breached the contract and by its breach damaged Benedict to a greater extent than the unpaid royalties. The obligations of the contract being interdependent there were and are no unpaid royalties due or owing and naturally no trust is impressed.

Furthermore, the operating statements kept by Benedict show that on many occasions, because of the breaches of contract by the Union, there was no money left over after paying the costs of production of each ton of coal. A trust cannot be impressed on nonexistent money.

In the case at bar there was no transfer to the Trustees of the alleged money owed. There was no money due and owing since such an obligation was dependent upon the performance by the Union of its obligations. Furthermore, the so-called royalties in the hands of Benedict were not in being because of the losses Benedict suffered by reason of the Union's unlawful breach of contract.

THE DEFENSES AGAINST THE CONTRACTING PARTY ARE AVAILABLE AGAINST THE TRUSTEES

In 13 Corpus Juris, 699:

(S 799) *5. Contract for Benedict of Third Person. One who seeks to take advantage of a contract made for his benefit by another must take it subject to all legal defenses and inherent equities arising out of the contract, such as the fraud of the party procuring it, the nonperformance of conditions, or the right to a setoff, unless the element of estoppel has entered.

In Williston on Contracts, Volume Two, Sec. 395:

"A more difficult case arises where the defense does not relate to the origin of the contract, but is based on supervening circumstances, such as non-performance by the promisee of a counter-promise made by him, increase of risk in insurance, or discharge by the promisee by release or rescission. The defense of non-performance should be available against the third

person whether he is a donee beneficiary or a creditor beneficiary. Such a defense is properly based on failure of consideration. As the substantial matter the parties had in mind was the performance of the promise the defendant promisor has in substance not received what he bargained for. Under these circumstances it is unjust to allow a mere donee to enforce the promise; and if the third person is a creditor he is not entitled to any greater right than his debtor had." (pp. 1137-1138)

In 12 American Jurisprudence 842:

"Even in jurisdictions which recognize the right of a beneficiary to enforce the contract, the agreement between the promisor and promisee must possess the necessary elements to make it a binding obligation — in other words, it must be a valid agreement between the parties to enable a third person, for whose benefit the promise is made, to sue upon it. His rights depend upon, and are measured by the terms of the contract. The right of a third person for whose benefit a promise is made is affected with all the infirmities of the contract as between the parties to the agreement. Unless the third person has been induced to alter his position by relying in good faith upon the contract made for his benefit or unless a novation has been effected, the promisor may set up any defense or equity against him which he could have set up as against the promisee. Thus, in an action by the beneficiary, fraud on the part of the promisee, mistake, and want of consideration may be asserted by the promisor."

THE BREACHES OF CONTRACT BY THE UNION ARE ADEQUATE DEFENSES IN THIS ACTION BY THE TRUSTEES

The breaches of the contract by the Union discharged the obligations to pay royalties on the part of Benedict. In 13 Corpus Juris 627:

"Dependent Covenants or Promises. Where promises

which form the consideration for each other are concurrent or dependent, the failure of one party to perform will discharge the other, and one cannot maintain an action against the other without showing performance, or a tender of performance, on his part, unless such performance has been excused, the general rule being that a person who has himself broken a contract cannot recover on it."

In 42 American Jurisprudence 852:

"Where the acts or covenants of the parties are concurrent and are to be done or performed at the same time, the covenants are dependent and neither party can maintain an action against the other without performance on his part."

In Restatement of Contracts 1932 Edition Section 274:

"Failure of Consideration as a Discharge of Duty.

(1) In promises for an agreed exchange, any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange even though his promise is not in terms conditional. An immaterial failure does not operate as such a discharge.

(2) The rule of Subsection (1) is applicable though the failure of performance is not a violation of legal duty."

It is immaterial that Benedict attempted to continue working under the contract. In 13 Corpus Juris 699:

"It is not necessary that defendant shall have rescinded his contract in order to prevent his assertion of non-performance by plaintiff as a defense to an action thereon, or to enable him to plead a failure of consideration."

It is true that Benedict attempted to continue operating under the contract. They were damaged by the breaches of contract by the Union, and this affected their ability to pay into the Fund. It is, therefore, equitable and just to

permit the amount that they were damaged by the breach of contract to be offset against what Benedict should be required to pay into the Fund.

The right of setoff is available in this case. In 47 American Jurisprudence 722:

"In Federal Courts.—The right of setoff generally, defenses arising from counterclaims, and even any equitable defense growing out of the same transaction are freely open to defendants sued at law in Circuit Courts of the United States. The rule as to setoff, in questions arising exclusively under the laws of the United States, cannot be influenced by any local laws or usage. In Federal Courts a defendant in his answer or the plaintiff in his reply may set forth a counterclaim or counterclaims and join, either as independent or as alternate claims, as many claims, either legal or equitable, or both, as he may have against the opposite party. The Rules of Civil Procedure, even though prescribing from a procedural standpoint 'one form of action,' have not changed the substantive character of legal and equitable issues. A defense in the nature of set off or recoupment, unless insolvency is an element, is adjudged a legal defense."

II.

The petitioner then attempts to argue in a round about way that the court's method of giving effect to the offset violates Section 301(b) of the Labor Management Relations Act in that the judgment would not be enforceable only against the organization as an entity and against its assets. We do not follow this argument. The judgment awarded Benedict against the United Mine Workers of America will be paid from the organization or from its assets. The fact that this judgment money, after it is paid into the court, may then be used to discharge Benedict's obligation to the trustees does not violate the dictates of Section 301(b).

Petitioners appear to argue that if the Union were unable

to discharge their judgment, then this would be a payment of the money judgment against the United Mine Workers by withholding the trust property due the trustees. Petitioners again ignore the fact that the trustees' claim against Benedict is subject to any defenses which Benedict has against the United Mine Workers, including set-off and any money allegedly withheld from the trustees is not trust property until it is determined that this royalty money is due and owing. In the instant case, this determination cannot be made until the amount of set-off is determined.

Petitioners are basing part of their argument on the supposition that the judgment debtors are unable to discharge the money judgment. In this case that would mean the United Mine Workers. To our knowledge the petitioners are imagining legal difficulties which are not present in this suit because there has been no intimation that the United Mine Workers are unable to pay this judgment.

CONCLUSION

It may be true that welfare funds represent a social device to be encouraged but this encouragement should never be the ignoring of fundamental principles of contract which two courts have adhered to in reaching the present sound decision. The present decision has not whittled away any protection given such trusts by the 1947 Labor Management Relations Act. Your respondents, therefore, insist that for reasons discussed, a writ of certiorari should not issue for the grounds assigned in the petition.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~50~~ 19

UNITED MINE WORKERS OF AMERICA, and UNITED
MINE WORKERS OF AMERICA, DISTRICT 28, *Petitioners*,

v.

BENEDICT COAL CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF TO OPPOSITION BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 563

UNITED MINE WORKERS OF AMERICA, and UNITED
MINE WORKERS OF AMERICA, DISTRICT 28, *Petitioners*,

v.

BENEDICT COAL CORPORATION.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

PETITIONERS' REPLY BRIEF TO OPPOSITION BRIEF

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

No attempt will be made to reply, *seriatim*, to the arguments advanced by Benedict Coal Corporation in its brief in opposition to the granting of a writ of certiorari herein.¹ Petitioners submit that the answers thereto are contained in their Petition; but in addition to such discussions, the Court's attention is directed to the following particular matters appearing in the opposition brief. These discussions will follow the order of argument as set forth in the opposition brief.

¹ Herein, Benedict Coal Corporation will be referred to as "Benedict." The abbreviation "O. B." refers to Benedict's opposition brief.

ARGUMENT

I.

Contrary to Benedict's argument (O. B. 17) that Petitioners are liable because they defaulted in their 1950 Agreement obligation by not exercising their best efforts through available disciplinary measures to prevent work stoppages by strike pending adjustment of disputes, the Sixth Circuit's predicate of union responsibility is that the right to strike was precluded by the Agreement. Further, while Benedict points to evidence that neither Scroggs nor the District took disciplinary action toward local members to discourage or prevent work stoppages (O. B. 17), the evidence is that Benedict made no demand upon UMW for such action (R. 501a-2a), and there is no evidence that disciplinary action would have prevented strike activity. In *Garmeada Coal Co. v. International Union, UMWA*, 1954, D.C., E.D., Ky., 122 F. Supp. 512, aff'd 6 Cir., 230 F. 2d 945, which, like the instant case, involved the 1950 Agreement, the district court, noting that "Even the suggestion that their rebellious conduct might result in revocation of their Union charter seemed to have little effect," declared that the men were "pursuing their right to strike" and that union representatives "did all that could reasonably have been expected of them in observing their duty to exercise their best efforts to maintain the integrity of the contract and to prevent the strike" (122 F. Supp. 518), which is what was done in the instant case as pointed out in the Petition herein, p. 45. In the first *Coronado* case,² contention was made that,

² *UMWA v. Coronado Coal Co.*, 259 U. S. 344, 395.

because UMW had disciplinary control over its members, its failure to suspend or expel union members allegedly guilty of illegal acts in furtherance of the union cause made UMW liable; but this Court rejected such contention, asserting UMW's responsibility "is a mere question of actual agency." So, too, in *United States v. International Union, UMW*, 1950, D.C., DC, 89 F. Supp. 179, argument that UMW was guilty of court contempt in that it had failed to revoke local union charters when union members voted not to return to work, was rejected by the district court which declared (p. 181) "There is no showing in the record that such action would have been appropriate." Herein, there is no evidence that disciplinary action would have prevented work stoppages. Indeed, in view of the spontaneous action of local union members depicted in the record in relation to the work stoppages, employee responsibility for the stoppages would have been incapable of ascertainment; disciplinary action might well have caused complete union loss of control over the men, resulting in the employees' being taken from the contract's coverage; and since the primary interest was to return the Benedict operation to work, in processing and settling the several disputes under the grievance machinery, as the record shows was done, Benedict's interests were better served than if disciplinary action had been taken, even if it had been required, which is denied by petitioners.

Further Benedict argument for attaching responsibility on petitioners (O. B. 17) that under the 1952

Agreement "both parties still agreed to maintain the integrity of the contract" finds ready answer in the language above-quoted from *Garmeada* and in the fact that neither the Sixth Circuit's opinion nor the District Court's charge (R. 729a) used the "integrity" clause of the 1952 Agreement as a basis for holding petitioners liable. Benedict's obvious argument that the "integrity" clause is a "no-strike" pledge is fully answered and rejected in *International Union, UMW, v. National Labor Relations Board*, DC Cir., 257 F. 2d 211, wherein that court, referring to the clause, said "It is likely that the agreement has been of great benefit to the operators and the union and that most disputes have been resolved by the use of the grievance machinery" (p. 218), which is precisely what occurred in the situations depicted in the instant record.

II.

Benedict's argument (O. B. 19-20) that UMW is responsible for the acts of a district field representative because in working on "disputes or local troubles, he was doing work provided for by the contract agreed to by the international union" finds challenge in both the evidence and judicial decisions.

Benedict's argument ignores that the 1950-1952 Agreements, in providing the several steps constituting the grievance machinery procedures, impose no obliga-

³ The 1952 Agreement became effective October 1, 1952, and all alleged stoppages occurred before that date except the incidents allegedly relating to Big Mountain Coal Company (see Petition, p. 16, 23-5): hence, Benedict's argument has nothing to do with the remaining 7 alleged stoppages, and this is admitted by Benedict (O. B. 17).

tions upon UMW and indeed no such obligations were assumed by UMW. Instead, grievances were to be processed by a mine committee, a creature of the Agreements (which designated not only the membership number but delineated that membership selection on the committee should be by Benedict's employees), and by District representatives (R. 123a, 104a-5a). The grievance procedures did not create joint obligations so as to impose any duty on UMW out of which it could be argued that an agency relationship arose. *Boeing Airplane Co. v. Aeronautical etc Assn.*, DC, Wash., 91 F. Supp. 596, aff'd 9 Cir., 188 F. 2d 356, cert. den. 342 U. S. 821. In *Coronado* (259 U. S. 344), it was asserted that because the District was doing UMW's work, this circumstance made the District UMW's agent; but the Court, rejecting such contention, said (p. 395):

"But it is said that the district was doing the work of the International and carrying out its policies, and this circumstance makes the former an agent. We cannot agree to this in the face of the specific stipulation between them that in such a case, unless the International expressly assumed responsibility, the district must meet it alone."

Argument paralleling that of Benedict was pressed by the National Labor Relations Board in *International Union, UMWA v. NLRB*, *supra*, and while the District of Columbia Circuit "did not decide" the issue "in view of our disposition of the case" on the ground that the 1952 Agreement did not forbid strike action, that court stated its inclination to agree that "wild-cat" strike action without union authorization did

not impose responsibility upon either UMW or a district affiliate (257 F. 2d 218). Significantly, subsequently the Board itself, in *Franklin Electric Construction Co.*, 42 LRRM 1301, declared that a local affiliate is not a mere branch or arm of a parent labor organization but a legal entity apart from it and that the parent's legal responsibility must rest upon actual agency.

In its opposition brief (p. 20), Benedict asserts that the "Coronado Coal Case is no precedent here," but as pointed out in the Petition filed herein (p. 37), current efficacy of the Coronado doctrine in determining union responsibility in the field of labor relations is mirrored by decisions of federal courts and the National Labor Relations Board. In addition to the cases cited therein (p. 37-38), the District of Columbia Circuit, in *International Ladies' Garment Workers Union, AFL v. NLRB*, 99 App. D.C. 64, 237 F. 2d 545, recognized that the Taft-Hartley Act's legislative history makes it plain that "imputation of the acts of one person to another" is forbidden "except when the one is acting as agent for the other," citing and applying the *Coronado* doctrine (237 F. 2d 551-2). So, too, in *Mile Branch Coal Company v. UMWA*, 1958, D.C., DC, 162 F. Supp. 65-6, UMW liability was asserted on the theory that the District and the local union were its agents and that District representatives were in fact UMW agents; but the District Court held that "The mere fact . . . that Districts were constituent bodies embraced within the International Union . . . does not

⁴ The District of Columbia Circuit rendered its decision on June 12, 1958, and the *Franklin Electric Construction Co.* case was handed down on July 24, 1958.

in and of itself make . . . the District . . . an agent of the International Union," citing and implementing the Coronado case (259 U. S. 344, 395), as well as the Fourth Circuit's decision in *United Construction Workers v. Haislip Baking Company*, 4 Cir., 223 F. 2d 872, that a union's regional director and its field representatives were not agents "who could bind the National organization."

Benedict's citation (O. B. 19) of *W. L. Mead, Inc. v. International Brotherhood of Teamsters*, 1 Cir., 230 F. 2d 576, is wholly abortive on the issue of agency since the question of agency was not an issue for determination by the First Circuit. Nor is Benedict's citation (O. B. 19) of *United Electrical Radio and Machine Workers of America v. Oliver Corporation*, 8 Cir., 205 F. 2d 376, apposite, since, as the opinion (p. 382) shows, "Hobbie was the official representative of the International Union for District 8," whereas in the instant case Scroggs was not an official representative of UMW. The opinion in the *Oliver* case shows further that Hobbie "had signed the [collective bargaining] contract as representative of the International Union" (205 F. 2d 386). It is thus clear that there is no analogy between the *Oliver* case and the instant one.

CONCLUSION

For the reasons set forth herein, in addition to those set forth in the Petition for Writ of Certiorari, Petitioners, and each of them, submit that Benedict's opposition to the granting of said Petition is without merit and should be rejected and again pray that the

Petition for Writ of Certiorari heretofore filed should be granted and that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit, entered in its Case No. 13,056, on September 26, 1958, as set forth in said Petition.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1959

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE
ROCHE, as Trustees of the UNITED MINE WORKERS
OF AMERICA WELFARE AND RETIREMENT FUND,
Petitioners,

BENEDICT COAL CORPORATION,

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

PETITIONERS' BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 18

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE
ROCHE, as TRUSTEES of the UNITED MINE WORKERS
OF AMERICA WELFARE AND RETIREMENT FUND,
Petitioners,

v.

BENEDICT COAL CORPORATION.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

PETITIONERS' BRIEF

I.

OPINIONS BELOW

The opinion of the Court of Appeals¹ is reported in 259 F. 2d 346, and appears in the present printed record at pages 762 *et seq.*²

¹ The United States Court of Appeals for the Sixth Circuit is sometimes referred to herein as the "Court of Appeals" or the "Sixth Circuit."

² Herein the abbreviation "R" refers to the printed record.

The opinion of the District Court³ on motion for summary judgment, the judgment of the District Court and the District Court's order overruling the petitioners' motion to amend that judgment are not reported but are set forth beginning at pages R. 68a, R. 75a and R. 85a, respectively.

II.

JURISDICTION

Jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under the provisions of 28 U. S. C. A. Sec. 1254(1).

Judgment of the Court of Appeals was entered in this case on September 26, 1958. Petition for writ of certiorari was filed in this Court on December 5, 1958. This Court granted certiorari on February 24, 1959, U. S. , 3 L. ed. 2d 570, S. Ct. (R. 780).

III.

STATUTES INVOLVED

This action involves Sections 301 and 302 of the Labor-Management Relations Act, 1947¹ (c. 120, Title III, 61 Stat. 150, 157; 29 U. S. C. A. Sections 185 and 186). The pertinent portions of the Act are set forth as Appendix I to this brief.

¹ The District Court referred to herein, unless otherwise indicated, is the United States District Court for the Eastern District of Tennessee.

² Herein called the "Act".

IV.

QUESTION PRESENTED

In an action by the Trustees of an irrevocable trust created under a collective bargaining agreement entered into by bituminous coal operators and United Mine Workers of America⁵ authorized by Section 302(c)(5) of the Act for the benefit of the employees of all the employer-settlors of the trust, which action is brought against one individual employer-settlor seeking to recover moneys due the trust under trust provisions of collective bargaining agreements which expressly vested title to such moneys in the Trustees, may such employer-settlor set off against such moneys damages sustained by it alone because of alleged conduct on the part of the said labor organization in violation of the Act and of the collective bargaining agreements?

The United States Court of Appeals for the Sixth Circuit concurred with the District Court in permitting such a set off, petitioners having contested that conclusion in both of said Courts.

V.

STATEMENT OF THE CASE

The question here presented arises from an interpretation of certain provisions of the Act and the provisions of collective bargaining agreements entered into between bituminous coal operators and UMW pursuant to authorization granted by the Act's Section 302(c)(5).

This action was commenced by the Trustees of the United Mine Workers of America Welfare and Re-

⁵ United Mine Workers of America will be referred to herein as "UMW."

tirement Fund in the District Court against Benedict Coal Corporation, to recover trust property exceeding \$75,000 on coal mined by Benedict.

The plaintiffs had become such Trustees as a consequence of provisions of the National Bituminous Coal Wage Agreement of 1950 which provisions were carried forward in amendments to that Agreement in 1951 and again in 1952 (R. 88a, 118a, 108a).⁶ Benedict, along with numerous other coal operators and associations responsible for the production of a great preponderance of the nation's bituminous coal, had executed said Agreements with UMW. In the 1950 Agreement, in addition to attempting to establish for the United States' bituminous coal industry a mine safety program, workmen's compensation and occupational disease benefits, wage and hour rules, vacation pay, etc., the parties also created the United Mine Workers of America Welfare and Retirement Fund (herein called "Fund") pursuant to the Act's Section 302(c)(5). To the Trustees of the trust, each signatory coal operator, including Benedict, therein agreed to pay a specified sum "on each ton of coal produced for use or for sale" (R. 94a). The Trustees designated in that instrument were required to administer the trust for those persons entitled to receive its benefits, namely, employees of the signatory operators, their families and dependents as set forth in the agreement (R. 95a). While under agreements immediately antecedent to the 1950 Agreement, *only title to moneys paid into* a predecessor trust vested in

⁶ The National Bituminous Coal Wage Agreement of 1950 will herein be called the "1950 Agreement"; that Agreement as amended in 1951, the "1951 Agreement"; and the 1950 Agreement as amended in 1952, the "1952 Agreement".

the Trustees thereof,⁷ but the 1950 Agreement specifically provides that "*Title to all the moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund,*" as an irrevocable trust. (R., 96a). These provisions were expressly carried forward in the 1951 and 1952 Agreements (R. 118a, 108a).

By answer Benedict denied liability, contending that the Trustees were a beneficiary to the 1950 and 1952 Agreements, that the Trustees were therefore bound by defenses available against UMW and that UMW had breached said Agreements by causing strikes in violation of the Agreements and in violation of the Labor-Management Relations Act, 1947 (29 U. S. C. A. 187), damaging Benedict in excess of the amount sought by the Trustees. Benedict further denied liability on the theory that the Trustees were barred from maintaining the action by virtue of an alleged breach of contract or trust on their part in failing to pay a certain type of benefits provided for in the Agreements (R. 17a).

In addition to its answer and counterclaim Benedict filed a "cross-claim" against UMW and District 28 seeking judgment against them for the damages it alleged it sustained and which it asserted as a defense to the Trustees' action. The basis of the cross-action was that the UMW and District 28 had caused some eleven strikes, all which were allegedly in violation of the 1950 and 1952 Agreements and two of which were

⁷ The antecedent agreement referred to is the National Bituminous Coal Wage Agreement of 1947. The exact language of that agreement here contrasted with the 1950 Agreement is as follows: "*Title to all the moneys paid into said Fund shall be vested in and remain exclusively in the Trustees of that Fund.* . . ." (R. 755).

allegedly in violation of Section 303 of the Labor-Management Relations Act, 1947 (R. 25a, 37a, 41a, 61a).

At the trial, the District Court instructed the jury, *inter alia*, that if it found that there was a breach of the Agreements, either by UMW and or District 28, or that either of them violated any of the secondary boycott provisions of the Act; and that as a result Benedict sustained damages, the jury should set off such damages against any amount awarded the Trustees (R., 733a).

The jury found that the Trustees were entitled under the collective bargaining agreements to recover from Benedict trust property amounting to \$76,504.21, which sum was the amount of royalty the parties stipulated Benedict had not paid (R. 151a). The jury further found that Benedict was entitled to set-off against that total, the amount of \$81,017.68, the latter sum being the amount which the jury found that Benedict was entitled to recover in its cross-claim for damages against UMW and District 28 (R. 74a).

The District Court thereupon entered judgment against UMW and District 28 for \$81,017.68 in favor of Benedict and ordered execution for such amount to issue, said sum to be paid into the registry of the Court. Insofar as the judgment rendered in favor of the Trustees is concerned, the judgment entered by the District Court reads as follows:

"It is further ordered that said sum of \$81,017.68 be paid into the registry of the Court to be disbursed by the clerk in accordance with instructions appearing below.

"It is further ordered that said Trustees, in accordance with the verdict rendered in their

favor, have and recover of Benedict Coal Corporation the sum of \$76,504.26, said recovery to be had in the manner following: From the aforesaid \$81,017.68 ordered paid into the registry of the Court, that the sum of \$76,504.26 be paid to said Trustees. That the difference between \$76,504.26 and \$81,017.68 be paid to Benedict Coal Corporation" (R., 76a).

Thereafter the Trustees unsuccessfully moved the District Court to have the judgment provide therein for interest thereon from the date of institution of suit and also for the issuance of execution against Benedict for the collection of the entire amount of the Trustees' judgment and to eliminate from the judgment the provision that the recovery awarded the Trustees be satisfied out of Benedict's judgment against UMW and District 28 (R., 82a). The District Court assigned two reasons for denying the motion:

(1) Its determination that the Trustees were third-party beneficiaries to the Agreements and as a result the sum certain owing to them as royalties was rendered uncertain by possibility of set off because of violation by UMW and District 28 of certain provisions of the Agreements, and

(2) Because of its determination that the Trustees were third-party beneficiaries to the Agreements, they have a right to unconditional judgment against Benedict for only such sum as any judgment rendered in their favor for royalties due exceeds damages adjudged against UMW and District 28 and inasmuch as under the verdict of the jury no such excess exists an unconditional judgment against Benedict will not be entered in favor of the Trustees (R., 85a).

It was the position of the Trustees, both in the District Court and in the Court of Appeals, that under the several Agreements title to the trust *res*—the obligation to pay the royalty—passed to the Trustees immediately upon coal production, so that any claim which Benedict might have had against UMW and/or District 28 could not and may not be utilized as a set-off against the Trustees' right to recover such trust *res*, title to which had vested in the Trustees. The action of the Trustees therefore was one to recover trust property and was immune from set offs or claims which Benedict might have against UMW and/or District 28.

The Court of Appeals held that the obligation by Benedict to make payments to the Trustees was dependent upon performance by UMW and District 28 of their obligations to Benedict⁸ and consequently they were third-party beneficiaries of the Agreements and subject to the defenses arising from the conduct of UMW and District 28 (R. 772-3). Reversing the judgment of the District Court in the Trustees' case and also the judgment in the UMW cross-action and remanding the latter for a redetermination of the amount of damages Benedict is entitled to recover,⁹ the Court

⁸ Though the Court of Appeals ~~held~~ that Benedict was entitled to set-off against the Trustees for acts constituting contract violations on the part of UMW or District 28, the Court held that Benedict was not entitled to a set-off against the Trustees for acts committed by individual employees and not imputable to the UMW or District 28. The basis of this conclusion was that acts on the part of individuals could not amount to a breach of contract (R. 773). This question is no longer material to the case.

⁹ The District Court in effect found that eleven strikes involved in the case constituted breaches of contract and, in addition, that two of such strikes constituted violations of the Labor Management Relations Act, 1947. The Court of Appeals held that there

of Appeals directed that the 'Trustees' judgment "will then be amended by the District Court to allow execution and interest on that part of the said judgment which is in excess of the set-off in favor of Benedict as so redetermined" (R. 762, 774). The judgment as entered by that Court (R. 760) directs that the District Court judgment be set aside "for amendment" in accordance with the opinion.

VI.

ARGUMENT

A. Where employers and a labor organization executed a collective bargaining agreement, creating an irrevocable trust fund as authorized by Section 302(c)(5) of the Act for the benefit of the employees of all such employers, whereby moneys would be paid into such fund by the employers in amounts determined by an employer's individual unit production, with title to all moneys paid into and or due and owing the fund vested in the trustees thereof, an employer who operates under the collective bargaining agreement may not set-off damages sustained by reason of breach of the agreement or violation of the Act by the labor organization against the amount due the fund on the employer's production.

- (1) The collective bargaining agreement explicitly provides that unpaid royalties become impressed with the trust upon the coal production from which the royalty is computed. Non-performance of a contractual obligation by the union or the violation of the Act by the union does not alter the legal obligation to pay the trust res resulting from coal actually produced.

Trustees insist that they maintained the present action as trustees seeking to recover trust property, title to which has vested in them, and not simply as third-party beneficiaries to a contract.

was evidence in the record to support the jury's determination that eight of the eleven strikes constituted breaches of contract. The Court of Appeals found it unnecessary to consider whether two of the eight strikes also violated Section 303 of the Act (R. 767).

The fundamental error in the holding of the Trial Court is that the Court considered the Trustees in this action as third-party beneficiaries to the Agreements. It was upon the basis that the Trustees were such beneficiaries that the Trial Court found that the Trustees' claim was subject to a set-off by virtue of the alleged breach of contracts and violation of the Act, on the part of UMW and District 28. The Court of Appeals reached the same conclusion.

The Trustees contend with respect to the unpaid royalties—the obligation upon which they seek judgment—that such unpaid royalties, by virtue of the language of the several Agreements and the conduct of the parties thereunder, are trust property in the hands of the employer-settlor, Benedict, and that such trust property in the hands of Benedict became impressed with a trust, and title vested in the Trustees, upon the production of coal from which the obligation is computed.

The trust instrument, it will be recalled, required that Benedict, as an operator signatory, pay into the Fund a designated sum “on each ton of coal produced for use or for sale” (R. 94a). Thus, the sole condition which Benedict, as an employer-settlor, placed upon the creation of the trust *res* was the production of coal.

Unlike trust instrument provisions contained in the 1947 Agreement (Exhibit 15, R. 126a, 755a), which had provided merely that:

“*Title to all the moneys paid into said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust*”,

in executing the 1950 Agreement, the contracting parties, who included Benedict, added that title to all moneys "*due and owing said Fund*" should be vested exclusively in the Trustees. The 1950 Agreement explicitly declared that (R., 96a)

"Title to all the moneys paid into *and or due and owing said Fund*, shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust . . ."

Thus, these added words, namely, "and or due and owing said Fund", are indeed meaningful and require the determination that simultaneously upon the production of coal the obligation to pay Trustees was created, and title to that obligation vesting exclusively in the Trustees, such unpaid obligation became property impressed with a trust in Benedict's hand as an employer-settlor, insofar as Benedict and the Trustees are concerned.

Since under the 1947 Agreement title vested in the Trustees only as to "*moneys paid into said Fund*", the difference in the language of the 1947 Agreement and the comparable trust instrument provisions in the 1950 Agreement and as carried forward in the 1951 and 1952 Agreements—"moneys paid into and or due and owing"—shows an unmistakable intent of the parties to create a trust at the time a particular obligation became computable.* Unless the words so added to the trust instrument are given such meaning, it follows that the inclusion of such language is a mere nullity.¹⁰

¹⁰ Consideration of the difference in the language of the two agreements should be given in light of the decision of the Court in *Lewis v. Jackson & Squire*, D. C., Ark., 1954, 86 F. Supp. 354. That action was brought by the Trustees under the 1947 Agreement to recover an unpaid obligation due the Fund. Giving emphasis to the language of the 1947 Agreement quoted above in

It had been implicit in the Seventh Circuit's *Lewis v. Quality Coal Corp.*, (CA-7, 1957) 243 F.2d 769, that moneys due but unpaid by Quality to the Fund's Trustees were held upon a trust. On August 18, 1959, the Seventh Circuit, in a second case against Quality [*Lewis v. Quality Coal Corp.*, (CA-7) _____ F.2d _____], interpreting specifically the Agreement's language that "Title to all moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund", expressly upheld the position herein asserted by the Trustees by declaring that

"Under this language a trust was created, the corpus of which was any money transferred or delivered by Quality to the trustees for the purpose of the agreement *or which Quality became obligated to transfer to the trustees for that purpose. We hold that a trust was created.*" (Emphasis supplied.)

Other well-reasoned authorities support Trustees' position.

The proposition is stated in 89 C. J. S., Trusts, sec. 24, p. 741, in the following language:

"It has been held . . . that a declaration of trust of property executed before the acquisition of the property, but which is subsequently acquired, does not fail for want of the requisite subject matter, *but that the instrument takes full effect when the subsequent title vests in the declarant.*" (Emphasis supplied.)

In comment "k" under section 26, p. 85, of the *Restatement of the Law of Trusts*, it is said:

"k. . . . Thus, if a person executes a declaration of trust of certain property not at the time owned

the text of this brief and to the fact that the action involved money which had not been paid into the Fund, the Court held that such money was not a part of a trust nor would it be a part of the trust until paid.

by him and he thereafter purchases property of that description, the act of acquiring the property coupled with the earlier declaration of trust may be a sufficient manifestation of an intention to create a trust at the time of the acquisition of the property."

That a trust may arise automatically upon acquisition of the res is stated in *Grubb v. General Contract Purchase Corporation*, (CA-2, 1938) 94 F. 2d 70, 73, as follows:

"... it is also true that a declaration of trust may precede acquisition of the res, and attach to it thereafter."

Other authorities setting forth the principle here discussed are:

Merritt Oil Corporation v. Young, (CA-10, 1930) 43 F. 2d 27, 29-30;

Brainard v. Commissioner of Internal Revenue, (CA-7, 1937) 91 F. 2d 880, 882-883;

Universal Ins. Co. v. Steinbach, (CA-9, 1948) 170 F. 2d 303, 305.

As between Benedict and the Trustees,¹¹ the contracting parties' intention, as previously indicated, was that obligations due and owing the Fund, as well as moneys paid into it, would be impressed with the trust, and that creation of the trust was simultaneous

¹¹ While in the recent case of *U. S. v. Embassy Restaurant, Inc.*, U. S. _____, 3 L. ed. 2d 601, this Court held that unpaid contributions due a welfare fund were not "wages due to workmen" within the priority section of the Bankruptcy Act, the instant case does not concern the question of priority between Trustees' claim and those of third party creditors, as did the *Embassy* case.

with the production of coal by which the amount of the royalty obligation, the trust *res*, was computable. This intention of the parties is clearly reflected in the language of the trust instrument itself which commands that "there shall be paid into such Fund by each operator signatory hereto" a designated sum "on each ton of coal produced for use or for sale" (R. 94a).

Thus, the Sixth Circuit's conclusions that Benedict's "obligation . . . to the Trustees was dependent upon performance by the Unions of their obligations" and therefore the Trustees were third party beneficiaries, "subject to the defenses arising from breaches by the Unions" (R. 772-3) are emasculatory of the trust agreed to by the Agreements' employer-settlors, including Benedict. An error of the Court of Appeals' reasoning is readily discernible when, despite the trust provisions' clear and positive language that "moneys . . . due and owing . . . shall be vested" in the Trustees, the Court of Appeals rejected Trustees' position because that would mean that the trust property became "due and owing" as soon as the coal left the ground" (R. 772).

The Court of Appeals recognized that if title to the royalties passed to the Trustees immediately upon the production of coal, the Trustees would be seeking to recover property held upon a constructive trust and would be immune from set-offs. The Court held, however, that royalties are "due and owing" only where the Unions have fully performed their agreement, notwithstanding the express covenant of the Agreement that production of coal is the sole condition precedent to the creation of the trust *res*. The Sixth Circuit has not only reformed the parties' agreement, but it has

violated the rule that "Express stipulations cannot, in general, be set aside or varied by implied promises". 12 Am. Jur., Contracts, Section 239, p. 768; *Ferroline Corp. v. General Aniline & Film Corp.*, (CA-7), 207 F. 2d 912, 926.

The parties to the National Bituminous Coal Wage Agreement of 1950 intended moneys due the trust to become impressed with the trust upon the production of coal. The effect of the Court of Appeals' decision is to dissipate entirely or postpone indefinitely any moneys becoming due the trust following the slightest breach of contract on the part of the Unions, either prior or subsequent to the production of coal upon which royalty obligation was computable. And this is true, under the Court of Appeals' decision, even though the unpaid royalties represent part of the consideration which Benedict agreed to pay for the work of its employees who produced the coal. (*United States v. Carter*, 353 U. S. 210), and even though Benedict permitted the work to be performed without notice to its employees, the Trustees, or to the Unions that it would not regard royalties being due the trust on coal which such work produced.

In denying to the Trustees their unconditional right to such trust property by refusing them the process of execution, both the District Court and the Court of Appeals have thus given aid to an employer-settlor admittedly guilty of breaching his covenant to pay in accordance with the Agreements. Further, it must be remembered that herein trust property which Benedict agreed to deliver in 1950 is now withheld because of alleged strike activity occurring even as late as 1953. Indeed, under the Sixth Circuit's thesis, trust property which Benedict agreed to but did not deliver

in 1950 could be withheld for strike activity occurring even as late as 1959 or thereafter.

It is not amiss at this juncture to point out that the trust property sought by Trustees in this action is, as the trust provisions expressly recite, impressed with an "irrevocable trust" (R. 96a) for delineated "benefits to employees of said Operators, their families and dependents" (R. 95a) and not limited to Benedict's employees alone. Indeed the Court of Appeals recognized that Benedict's employees had only a "potential" and not a "present 'interest' in the trust res" (R. 773). Yet, to deprive Trustees of an unconditional judgment for recovery of the trust *res*, especially when Benedict's obligation to deliver to the Trustees the trust property is a transaction wholly separate from situations upon which Benedict's claims against UMW and District 28 are predicated, effectuates a penalty upon employees of all other employer-settlers as "potential" beneficiaries, since the assets from which the Trustees must satisfy and fulfill their fiduciary obligation toward all employees covered by the Agreement would be necessarily reduced. Further, since employee coverage under such Agreements includes those of Benedict, the effect of the Sixth Circuit's decision is to impose on the royalties paid into the Fund by other employer-settlers the burden of Trustees' fiduciary obligations for Benedict's employees.

We, of course, do not contend that Benedict may not sue the Unions for any breach of contract they may have committed. We do contend, however, that the Sixth Circuit's conclusion that damages recovered against the Unions may be offset against the obligations "due and owing" by Benedict to Trustees, is clearly erroneous.

Benedict declared its intention to create a trust upon the production of coal and agreed that title to moneys due the trust would be vested in the Trustees even before actual payment of such moneys to them. Furthermore, Benedict operated under such agreement without giving the slightest indication of an intention to repudiate the agreement. In fact, after a large part of the obligation here sought to be recovered by the Trustees came due, Benedict reaffirmed its previous declaration by executing the National Bituminous Coal Wage Agreement of 1952, and by making actual payments of royalties to the Trustees throughout the period involved in this litigation (R. 149a-51a).

To say a trust was not impressed on Benedict's obligation to the Trustees as between Benedict and the Trustees is to ignore the provisions of the trust agreement and the conduct of the parties with respect thereto.

(2) The allowance of the set-off is erroneous because it effects the revocation of an irrevocable trust.

The obligation which the Trustees seek to recover is, for the reasons stated in the preceding section of this brief, impressed with a trust. May Benedict by way of set-off for alleged contractual breach by the union signatory to the contract containing the irrevocable trust provisions effect a revocation of the trust which has been impressed upon this obligation?

The trust agreement expressly provides that (R. 95a):

“... this Fund is an irrevocable trust ...”

It also expressly provides that (R. 96a):

“Title to all the moneys paid into and or due and owing said Fund shall be vested in and re-

main exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust . . .” (Emphasis supplied.)

The obligation here in question being impressed with a trust and the trust being, by the agreement of the parties, an irrevocable trust, it is the position of the Trustees that Benedict may not effect a revocation thereof by way of set-off.

In the *Restatement of the Law of Trusts*, Sec. 330, at page 984, the following statement is made:

“The settlor has power to revoke the trust if and to the extent that by the terms of the trust he reserves such a power.”

The foregoing rule is supported by an unbroken line of authorities.

In *Boyer on Trusts*, Vol. 4, Part 2, Sec. 993, p. 429, the following statement is made:

“If a trust has been created, it results in the vesting of property rights in the cestuis with regard to the trust subject-matter. If these property rights were absolute and unconditional, they cannot be taken from their owners without action on the part of such owners by way of surrender or conveyance. The creator of those property rights, whether for a consideration or voluntarily, cannot resume his former position as owner merely because of a change of mind or a feeling that he has unwisely given or conveyed for a consideration.”

The Court of Appeals for the Sixth Circuit in the case of *Fricke v. Weber* (CA-6, 1944), 145 F. 2d 737, in considering the right of a settlor to revoke a trust, said (page 739):

"As no reservation was made of a right to alter or revoke the trust, under both common law and the Ohio decisions it was irrevocable without the consent of the beneficiary."

In *Scott on Trusts*, Vol. III, Sec. 330.1, p. 2394, the following statement is made:

"Where the creation of a trust is evidenced by a written instrument which purports to include the terms of the trust, and there is no provision in the instrument expressly or impliedly reserving to the settlor power to revoke the trust, the trust is irrevocable."

The conclusion of the Court of Appeals is at variance with established principles governing the administration of trusts; it is likewise at variance with the intent of the parties entering into the subject collective bargaining agreements; and it is erroneous. Pertinently, the Sixth Circuit has cited no decisional law to support its conclusion.

(3) The Court of Appeals' conclusion that Benedict's obligation to the Trustees was dependent upon union performance is based upon a misconception of the Agreement.

In its rejection of Trustees' contention, the Court of Appeals reasoned that "To thus construe the royalty provisions as being independent of the obligations assumed by the Unions would, however, be inconsistent with the agreement considered as an entirety", pointing to its language that "This Agreement is an integrated instrument and its respective provisions are interdependent . . ." (R. 772). In so reasoning, it is evident that the Court of Appeals misconceives the purport of the Agreement's language.

Initially, as it has already been shown, the trust instrument under which the Trustees assert their right to the trust *res* constituted the Fund "an irrevocable

trust" and, secondly, Benedict as an employer-settlor imposed but one condition upon the trust *res*' creation, i.e., the production of coal by employees. Yet, in arguing, as the Court of Appeals does (R. 772), that the "provision requiring that the parties resort to the" grievance procedure "for the settlement of local disputes" is a "part of the consideration of this contract", the Court imposes upon the trust and writes into the trust instrument itself a condition which the parties did not impose and which in fact collides with and is offensive to the trust instrument's language obligating Benedict to pay a certain sum "on each ton of *coal produced* for use or for sale" into the Fund which Benedict agreed was "an irrevocable trust". Certainly, agreement that processing of disputes through grievance machinery procedures is "part of the consideration of this contract" is not synonymous with or tantamount to a condition that failure so to process disputes warrants a set-off against the trust settlor's unconditional promise to pay into the Fund a royalty on each ton produced for use or for sale.

In an examination of the Agreement's language that the contract is an integrated one and its provisions interdependent, the Court must be mindful that it is an industry-wide agreement executed by numerous signatory operators competing with each other and who, executing a contract with the collective bargaining agent of their respective employees would of necessity, because of such competition, demand the assurance that the agreement signed was the entire agreement which the union had signed with each contracting operator and, likewise, that no provision expressed in the national or industry-wide agreement had been deleted for the benefit of any one or more of such signatories.

It is well settled by now that collective bargaining agreements create rights which are uniquely personal to a contracting union, to the employees, and to trustees of welfare funds created pursuant to and under authority of the Act's Section 302(c)(5). *Assn. of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U. S. 437; *International Ladies' Garment Workers Union, AFL v. Jay-Ann Co., Inc.*, (CA-5, 1956), 228 F. 2d 632; *United Steel Workers of America v. Pullman-Standard Car Mfg. Co.*, (CA-3, 1957), 241 F. 2d 547. That the language under consideration was never intended or devised to be interpreted so as to require union performance as a condition precedent where trustees or employees were asserting some uniquely personal claim under the contract is made obvious by considering a situation where employees were suing an employer for wages or vacation pay, payment of which is required by the contract. Certainly it would shock the conscience and all sense of justice to permit an employer to defend and destroy the wage earners' claim for services rendered on the ground that the contracting union had defaulted in the performance of an obligation assumed by the union upon the premise that the bargaining agreement was an integrated one and its provisions interdependent. This is equally applicable to the instant situation where Trustees, as this Court stated in the *Carter* case (353 U. S. 220) "stand in the shoes of the employees . . . claiming recovery for the sole benefit of the beneficiaries of the fund, and those beneficiaries are the very ones who have performed the labor".

- (4) The allowance of a set-off of damages caused by a breach of contract by a union against unpaid trust obligations is erroneous because in conflict with Congressional purpose.

Regardless of whether the trust was impressed upon the moneys due the Trustees prior to actual payment thereof into the Fund, the Trustees contend that the allowance of a set-off against unpaid royalties was erroneous because it conflicts with Congressional purposes as manifested in the Act's Section 301 and Section 302(c)(5).

More specifically the Trustees contend that the decision of the Court of Appeals is erroneous in that its legal implication is to effect a satisfaction of a union obligation out of assets held in trust for the benefit of employees and their families.

It is clear that the United Mine Workers of America, though it is the labor organization whose efforts brought the Fund into being, has no interest in royalties whether paid or unpaid. This very point was considered in *Lewis v. Quality Coal Corp.* (CA-7, 1957), 243 F. 2d 769, 772, where the Court said:

"Defendant urges also that United Mine Workers of America, having signed the contract, is a necessary party, but the record discloses that the UMWA has no title to the money in the fund, or right to recover same. It is in no way interested therein, except to see that the trustees perform their trust duties. The Act has been so interpreted in *United Marine Division, etc. v. Essex Transportation Co.*, 3 Cir., 216 F. 2d 410, 412. No person is legally interested in this controversy except plaintiffs, who, as trustees, claim the right to recover, and defendant who has agreed to pay the royalties demanded."

In *United States v. Carter*, 353 U.S. 210, it was said that unpaid contributions sought to be recovered by

trustees were in the nature of compensation due for the labor of employees. May asset of this singular character, which Congress by the mandatory procedures of Section 302(c)(5) of the Act took special pains to segregate from assets of the contracting union in order to create a "perfectly definite fund" and not a "war chest" for the union, be subjected to employer claims in this manner?¹²

We find no reported decision in which this question or a similar question has been determined. We submit, however, that the answer may be found in the will of Congress as expressed in the Labor Management Relations Act, 1947.

Section 301(b) of the Act provides in part:

"... Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States *shall be enforceable only against the organization*

¹² In discussing what was to become Section 302(c) of the Act, its sponsor, Senator Taft, stated:

"The purpose of the provision is that the welfare fund shall be a perfectly definite fund, that its purposes shall be stated so that each employee can know what he is entitled to, can go to court and enforce his rights in the fund, and that it shall not be, therefore, in the sole discretion of the union or the union leaders and usable for any purpose which they may think is to the advantage of the union or the employee. . . . The tendency is to demand a welfare fund as much in the power of the union as possible. Certainly unless we impose some restrictions we shall find that the welfare fund will become merely a war chest for the particular union." 93 Cong. Rec. 4746-7 (1947). (Emphasis supplied.)

as an entity and against its assets, and shall not be enforceable against any individual member or his assets." (Emphasis supplied.)

In the instant case the recovery of unpaid royalties by the Trustees is conditioned upon, and postponed until the UMW and District 28's payment of a money judgment to be entered against them upon assessment of damages at a new trial. If, under Section 301(b), the judgment debtors are unable to discharge the money judgment, the effect of such conditional judgment results in satisfaction of the money judgment against the labor organization, not out of its assets as Section 301(b) makes mandatory but by withholding from the Fund moneys found due the Fund. The same result would follow, and even more clearly, if the doctrine approved by the Court of Appeals were applied in a case where an employer invoked the principle of set-off defensively but without the union's being made a party litigant. In such case, Trustees' recovery would be reduced by any damages proven, even though judgment would not be rendered against the absent union.

We recognize that the specific situation Congress had in mind in enacting the limitation in Section 301(b) which is material in this action was to eliminate the possibility of satisfying a judgment against a labor organization out of the assets of its members as so nearly occurred in the *Danbury Hatters* case.¹³ We insist, however, that a Congressional intention in-

¹³ *Lodge v. Lawlor*, 208 U. S. 274; and *Lawlor v. Lodge*, 235 U. S. 522. See also comments of Senator Case, 93 Cong. Rec. 6437-8 (1947); of Senator Taft, 93 Cong. Rec. 3955 (1947); and of Senator Ball, 93 Cong. Rec. 5146 and A2377.

consonant with the Court of Appeals' opinion is plainly evident in Section 301(b). That intention was to restrict responsibility for union acts to the union alone.

On a recent occasion this Court has recognized that "the aims and social policy [of the Act] . . . were drawn with broad strokes" and that "the details had to be filled in, to no small extent, by the judicial process." *San Diego Building Trades Council v. Garmon*, U. S. , 3 L. ed. 2d 775, 780. This Court in construing the equally sensitive problem of application of anti-trust legislation to organized labor emphasized the importance of giving "hospitable scope" to Congressional purpose even when meticulous words are lacking." *United States v. Hutcheson*, 312 U. S. 219. In that case it was said, p. 235:

"... The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: 'A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.' *Johnson v. United States*, (CCA 1st) 163 F. 30, 32, 18 L. R. A., (NS), 1194."

As elsewhere shown (*ante*, p. 21), if the subject of this suit were unpaid wages rather than unpaid

royalties, it is unthinkable that the employer could offset its claim for damages against the union against the employees' wage claims. We perceive no reason why the same reasoning should not apply here for the unpaid welfare contributions are closely analogous to the "uniquely personal right of the employee . . . to receive compensation for services rendered his employer." *Association of Westinghouse Salaried Employees vs. Westinghouse Electric Corp.*, 348 U. S. 437, 461, see concurring opinion of Mr. Chief Justice Warren; *United States vs. Carter*, 353 U. S. 210.

Trusts of the type represented by the Trustees in this action represent a social device comparatively new on the American scene. As an instrumentality through which the working man may receive a measure of protection from illness and old age, the potential of such trusts is inestimable. It has been judicially recognized that such trusts represent a device which deserves to be encouraged and protected. *Upholsterers' Inter. Union v. Leathercraft Furn. Co.*, D. C. E. D., Pa., 1949, 82 F. Supp. 570, 575. This was the spirit in which the Labor Management Relations Act undertook to regulate such trusts.

We submit that the construction placed upon this Act and upon the collective bargaining agreements here involved by the District Court and the Circuit Court of Appeals brings about a result which is wholly at variance with the Congressional intent in its enactment and is erroneous.

CONCLUSION

The Trustees respectfully submit that this action should be remanded with instructions to modify the judgment of the Court of Appeals to provide for the issuance of execution on the judgment awarded to the Trustees.

In the alternative the Trustees submit that the judgment of the Court of Appeals should be set aside and that the case be remanded for a new trial in accordance with this Court's determination of the questions of law involved.

Respectfully submitted,

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APPENDIX I

29 USC. Section 185

*Suits by and against labor organizations—
Venue, amount and citizenship*

“(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

“(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.”

29 USC. Section 186

Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

“(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing, of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of em-

ployees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

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JAMES B. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. 19

UNITED MINE WORKERS OF AMERICA, and UNITED MINE
WORKERS OF AMERICA, DISTRICT 28, *Petitioners,*

v.

BENEDICT COAL CORPORATION, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit

PETITIONERS' BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 19

UNITED MINE WORKERS OF AMERICA, and UNITED MINE
WORKERS OF AMERICA, DISTRICT 28, *Petitioners*,

v.

BENEDICT COAL CORPORATION, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit

PETITIONERS' BRIEF

I. OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit¹ is reported in 259 F. 2d 346, and it appears in the printed record at pp. 761-779.

¹ Herein the United States Court of Appeals for the Sixth Circuit is referred to as either the "Court of Appeals" or "Sixth Circuit".

The opinion dealt with the Sixth Circuit's cases No. 13055, styled *John L. Lewis et al. v. Benedict Coal Corporation* (which is now pending in this Court as Case No. 18), and No. 13056, styled *United Mine Workers of America, and United Mine Workers of America, District 28 v. Benedict Coal Corporation* (now pending in this Court as Case No. 19), both Cases No. 18 and 19 having reference to the October Term, 1959.

An opinion of the district court,² found in the printed record at pp. 68a-71a, overruled a motion for summary judgment by petitioners in Case No. 18.

II. JURISDICTION

The Court of Appeals' judgment in this case was entered September 26, 1958 (R. 761).³ Petition for writ of certiorari was filed in this Court on December 5, 1958, by United Mine Workers of America and United Mine Workers of America, District 28.⁴ Jurisdiction of this Court is invoked under 28 USCA, Sections 1254(1) and 2101(c). This Court granted certiorari on February 24, 1959 (R. 780; — U. S. —, 3 L. ed. 2d 570).

III. STATUTES INVOLVED

The pertinent statutory provisions involved are Sections 7, 13 and 301 of the Labor Management Relations Act, 1947⁵ (29 USCA, Sections 157, 163 and 185). The pertinent portions of the Act are set forth in Appendix I to this brief.

² This reference is to the United States District Court for the Eastern District of Tennessee, Northeastern Division, which will be referred to herein as the "trial court" or "district court".

³ The abbreviation "R." herein refers to the printed record.

⁴ Herein, United Mine Workers of America will be called "UMW", and United Mine Workers of America, District 28 will be referred to as either "District 28" or "District". Collectively, they are referred to herein as the "Unions".

⁵ Herein called the "Act".

IV. QUESTION PRESENTED

Where (1) the settlement of disputes section of collective bargaining agreements antedating 1950 provided that Mine Workers shall not engage in a work stoppage pending settlement of disputes under grievance machinery procedures and such agreements contained other "no strike" clauses, and (2) under the Labor Management Relations Act, 1947, the right to strike became a bargainable subject, and (3) in 1950 UMW and coal operators signatories to the National Bituminous Coal Wage Agreement of 1950, deleted such clauses therefrom and expressly covenanted that the "no strike" clauses in prior agreements were rescinded and made null and void, and (4) signatories to such 1950 Agreement covenanted that stoppages, as well as disputes, shall be settled exclusively under grievance machinery procedures set forth in such contract, is a stoppage of work pending settlement of a dispute cognizable under the grievance machinery procedures proscribed thereby and a violation of the 1950 Agreement so as to subject UMW and District 28 to damage actions under the Act's § 301?

V. STATEMENT OF THE CASE

1. THE TRIAL PROCEEDINGS AND THE SIXTH CIRCUIT'S JUDGMENT

Benedict Coal Corporation (herein called "Benedict"), a coal producer in Lee County, Virginia, as well as UMW and District 28, were signatories to the National Bituminous Coal Wage Agreement of 1950 and to the amendments thereto in 1951 and 1952.⁶

⁶ The National Bituminous Coal Wage Agreement of 1950 (Ex. 2, R. 88a, 154a) will be called the "1950 Agreement". That Agreement as amended January 18, 1951 (Ex. 10, R. 118a, 241a), will be called the "1951 Agreement", and the 1950 Agreement as amended September 29, 1952 (Ex. 3, R. 108a, 154a-155a), the "1952 Agreement".

These Agreements, effective during the period March 5, 1950 - June, 1953, did not contain an express no-strike clause or other express waiver or limitation upon the right to strike. They did contain provisions for grievance machinery procedures for the settlement of disputes.⁷

In the 1950 Agreement, the contracting parties had created the "United Mine Workers of America Welfare and Retirement Fund" (herein called "Fund"); and the several Agreements provided that signatory coal operators, who included Benedict, would pay into that Fund a designated sum "on each ton of coal produced for use or for sale" (R. 94a).

Trustees of the Fund,⁸ by complaint filed in the trial court, sought judgment against Benedict for unpaid royalties on coal mined by Benedict which were due and owing under the 1950, 1951 and 1952 Agreements. Denying liability to the Trustees, Benedict asserted inter alia that UMW had breached its agreement with Benedict; and pursuant to the Act's Section 301 (29 USCA 185), as cross-complainant, Benedict filed its cross-claim⁹ for compensatory damages (R. 64a) against UMW and District 28 upon allegations, denied

⁷ See *post*, p. 11, fn. 22.

⁸ The Trustees' action was styled John L. Lewis, Charles A. Owen and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund v. Benedict Coal Corporation in the trial court. Judgment rendered therein was appealed by the Trustees and was docketed as No. 13,055 in the Sixth Circuit. Substitution of Henry G. Schmidt as successor Trustee to Charles A. Owen was granted by the Sixth Circuit, October 16, 1958 (R. 779).

⁹ The original cross-claim is found beginning at page 25a of the printed record and amendments thereto begin at pages 37a, 41a, and 61a thereof.

by UMW and District 28,¹⁰ that the Unions had breached the Agreements effective during 1950-53 by calling "a number of unlawful strikes" at Benedict mines during that period, during which and previous to such strikes Union agents refused to arbitrate matters in dispute and to follow the contractual provisions for adjustment of disputes. UMW and District 28 insisted that the several strikes were not in violation of the Agreements,¹¹ a position rejected by the trial court (R. 86a, 729a).

Upon jury trial, a verdict of \$81,017.68 was rendered against UMW and District 28 in Benedict's favor (R. 74a). A verdict against Benedict in favor of the Trustees was rendered for \$76,504.21¹² (R. 74a). The trial court entered judgment in said amount in Benedict's favor against both UMW and District 28, "for which execution may issue"; and ordered that said sum be paid into the Court's registry, with directions to the clerk that of said amount the sum of \$76,504.26 be paid to the Trustees and that the difference be paid to Benedict (R. 76a). One-half of costs were ordered to be paid by Benedict, the other

¹⁰ See Answer and Amended Answer of UMW and District 28 (R. 46a, 72a). The Unions, denying the material allegations of the cross-complaint, alleged upon advice that the strikes had been "brought about largely, if not entirely, because of the arbitrary and unreasonable conduct" of Benedict and that Benedict had breached the bargaining contracts and disregarded its obligations to its employees by failing to pay, or being grossly delinquent in the payment of vacation pay, in payments to the Fund, and in other ways (R. 46a-53a, 72a).

¹¹ Such UMW and District 28 assertions appear in exceptions to the jury charge (R. 742a), in motions for directed verdict (R. 713a), and in the motion for a new trial (R. 77a-81a).

¹² The verdict for \$76,504.21 was placed in the judgment (R. 76a) as \$76,504.26.

half by UMW and District 28, "for which execution may issue, unless said costs are paid" (R. 76a). Unions noted their exceptions to the trial court's jury charge (R. 738a-42a). Motion for a new trial was denied petitioners (R. 77a, 86a).¹³

Upon appeal, the Sixth Circuit, regarding as a basic issue the inquiry "Did any or all of the strikes in question violate the agreement of 1950-52 . . . if they were caused by the Unions?" (R. 764), concluded that "a strike to settle a dispute which a collective bargaining agreement provides shall be settled by an exclusive and obligatory alternative procedure constitutes a violation of the agreement" (R. 766; 259 F. 2d 351).¹⁴ Affirming the jury verdict and the district court on the issue of the Unions' liability to Benedict, by judgment entered September 26, 1958, it set aside the trial court's judgment because of errors "affecting the amount of damages Benedict was entitled to recover from the Unions" and remanded the case "solely for a redetermination . . . of the amount of damages" Benedict is entitled to recover against UMW and District 28 (R. 774, 761).

2. THE FACTS

a. The Alleged Strike Activity and the Sixth Circuit's Holdings Relative Thereto

Benedict grounded the Unions' responsibility upon eleven alleged strikes. As to two, the Sixth Circuit held the evidence insufficient to show the stoppages

¹³ Petitioners' assigned grounds to set aside the jury verdict, to vacate judgment entered thereon, and for a new trial appear in the printed record beginning on page 77a.

¹⁴ While other issues were presented in Unions' petition for certiorari, this Court limited the granting of the writ to the issue of whether the strikes were violative of the 1950 Agreement.

"were concerted strikes resulting from a labor dispute"; that they were "clearly spontaneous" and therefore "did not constitute violations of the 1950-52 agreement" (R. 767). It likewise excluded a third strike because of its being "national in scope, [the] dispute was not under the agreement subject to settlement on the local or district level" (R. 767). As to the remaining eight strikes, the dates and characterization of which are set forth below,¹⁵ the Sixth Circuit held "the evidence was sufficient to support the jury's determination that they resulted from localized labor disputes which were cognizable under the settlement procedure provided by the agreement"¹⁶ (R. 767), rejecting the Unions' contentions that neither UMW nor District 28 authorized, called, participated in or ratified any of said strikes. In each of said strike situations when District 28 representatives were called concerning the respective disputes which occasioned the stoppages, the grievances were settled and the miners returned to work (R. 567a-9a, 604a; R. 166a,

¹⁵ The dates and characterization of the eight strikes are as follows:

1950—April 14 and 17,	the seniority strike;
1951—July 30-31,	the vacation pay strike;
1951—October 1-8,	the credit strike;
1951—November 2, 7,	the Ernest Tabor discharge strike;
1952—February 7-8,	the M. M. Campbell strikes;
April 24-25,	
1952—August 5-6,	the Anders-Roark discharge strike;
1953—May 18-19,	the Big Mountain Coal Co. strike.

¹⁶ Benedict contended in its complaint that two of the strikes were violative of the Act's Section 303 (29 USCA 187). The Sixth Circuit, having found the evidence sufficient to support the jury's determination that the eight strikes were cognizable under the settlement procedure provided by the Agreement, found it "unnecessary to consider whether two of these strikes also violated the Labor Management Relations Act of 1947" (R. 767, fn. 6).

168a, 275a, 281a, 578a-9a; R. 282a-3a, 170a, 580a; R. 171a-3a, 616a; R. 577a, 583a-5a; R. 173a-4a, 636a-9a, 644a-5a; R. 199a, 314a, 588a-90a, 658a-60a, 670a-1a).

b. The Collective Bargaining History and the 1950 Agreement

The Sixth Circuit's agreement with Benedict's assertion that the strikes violated the agreements necessitates examination of pertinent provisions thereof and the collective bargaining history antecedent thereto reflecting the meaning of such provisions.

Collective Bargaining Agreements Antedating 1947 Contained Waivers of the Right to Strike.

Collective bargaining agreements in the bituminous coal industry, antedating 1947, contained specific waivers of coal miners' right to strike.

The Southern Wage Agreement of 1941 (Ex. 14, R. 122a, 247a) mandated that:

"Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute" (R. 124a)¹⁷

and that

"A strike or stoppage of work on the part of the Mine Workers shall be a violation of this Agreement" (R. 125a)

and that

"Under no circumstances shall the Operator discuss the matter under dispute with the Mine Committee or any representative of the United Mine Workers of America during suspension of work in violation of this Agreement" (R. 125a).

¹⁷ All emphases used in this brief are supplied.

Likewise, the 1945 Agreement declared that

*"For the duration of this Agreement no strikes shall be called or maintained hereunder."*¹⁸

The 1947 and 1948 Agreements Rescinded the No-Strike Clauses.

On June 23, 1947, Congress enacted the Taft-Hartley Act, subjecting labor organizations, among other matters, to money judgments derived from actions authorized under Section 301 for breach of contract.¹⁹ With such statutory sanctions confronting UMW and its affiliates, the 1947 Agreement, made July 7 of that year, effective July 1, 1947 to June 30, 1948, and executed July 8, 1947 (Ex. 15, R. 126a, 248a), provided that:

"this Agreement . . . shall cover the employment of persons employed in the bituminous coal mines covered by this Agreement during such time as such persons are able and willing to work." (R. 127a).

It omitted the "no-strike" and related covenants of the 1941 and 1945 Agreements; and by affirmative recitals made it positive that a strike or work stoppage was no longer a violation of the collective bargaining agreement. In the 1947 Agreement the contracting signatories, in a section styled "Miscellaneous", expressly agreed that the prior no-strike clauses were *"rescinded, cancelled, abrogated and made null and void."* Sub-

¹⁸ The 1945 Agreement, admitted in evidence (Ex. 11, R. 120a, 244a), appears, in part, in the printed record at pages 120a-121a, but the quoted language in the text above found in Section 13 of that Agreement was inadvertently omitted. It is printed in Appendix II, *post*, p. 31.

¹⁹ The Act likewise subjected labor organizations to injunction sanctions based upon unfair labor practices and to money judgments in actions under Section 303 for violations of secondary boycott prohibitions found in Section 8(b)(4) of the Act.

section 1 of the "Miscellaneous" section read thus (R. 129a):

"Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any 'no-strike' or 'Penalty' clause or clauses or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void."²⁰

In the same section, subsection 3 provided that (R. 129a):

"The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the Settlement of Local and District Disputes" section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry."

The 1948 Agreement carried forward the 1947 Agreement and terminated by its own terms on June 30, 1949 (Ex. 15, R. 126a, 248a).

²⁰ In the 1947 Agreement a section styled "District Agreements" provided that (R. 127a):

"... any provisions in District or Local Agreements providing for the levying, assessing or collecting of fines or providing for 'no-strike,' 'indemnity' or 'guarantee' clauses or provisions are hereby expressly repealed and shall not be applicable during the term of this Agreement . . ."

The 1950 Agreement Continued the Repeal of the No-Strike Clauses of the Earlier Contracts.

By specific recitals in the 1950 Agreement, terms of certain antecedent agreements in the bituminous coal industry were carried forward, subject to the terms and conditions of the 1950 Agreement (Ex. 2, R. 88a, 154a);²¹ but it expressly continued the repeal and cancellation of the no-strike and related clauses of the 1941 and 1945 Agreements (Ex. 2, R. 106a).

Whereas the 1941 Agreement's "Settlement of Disputes" section commanded that "Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute" (R. 124a), and "there shall be no suspension of work on account of" disputes (R. 124a), no such proscription against stoppages is found in the corresponding disputes section of the 1950 Agreement.²² The proscription against coal operators' ne-

²¹ These were:

- (a) the Appalachian Joint Wage Agreement of 1941 (R. 122a),
- (2) the Supplemental Six-Day Work Week Agreement,
- (3) the National Bituminous Coal Wage Agreement of 1945 (R. 120a), and
- (4) all various District Agreements based upon the aforesaid basic Agreements as such district agreements existed on March 31, 1946—but all "subject to the terms and conditions of the 1950 Agreement and as amended, modified and supplemented" thereby.

²² The 1950 Agreement's "Settlement of Local and District Disputes" section reads in part thus (R. 104a):

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

- "1. Between the aggrieved party and the mine management.

negotiating the dispute, found in the 1941 Agreement (*ante*, p. 8), was also omitted from the 1950 Agreement. *These manifestly pertinent changes were completely ignored by the Sixth Circuit.* Moreover, the other limitations upon the right to strike contained in the 1941 and 1945 Agreements, which were first rescinded in the 1947 Agreement, were likewise cancelled under the 1950 Agreement's terms. The precise language of subsections 1 and 3 of the "Miscellaneous" section of the 1947 Agreement (*ante*, p. 10) was placed in the 1950 Agreement. The 1950 Agreement, thus recognizing the right to strike,²³ also provided in sub-

"2. Through the management of the mine and the Mine Committee.

"3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

"4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

"5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers."

²³ The 1950 Agreement, under the subheading "Miscellaneous", paragraph 1, reads (R. 106a):

"1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any 'no strike' or 'Penalty' clause or clauses or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void."

section 4 of "Miscellaneous" that UMW and the Operators affirmed

"their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement" (R. 106a).²⁴

The 1950 Agreement contained no express waiver or limitation of the right to strike.

3. THE SIXTH CIRCUIT'S CONCLUSION THAT STRIKE ACTIVITY VIOLATED THE 1950 AGREEMENT

Though the Sixth Circuit agreed that "the agreement expressly stated that the 'no strike' provisions of the previous contracts were superseded" (R. 764) and that "the right to strike . . . was expressly preserved in the 1950-52 agreement" (R. 766), it declared that determination of whether the strikes violated such agreement "depends upon what effect the agreement to settle all local disputes in accordance with the 'Settlement of Local and District Disputes' procedure had upon the right to strike" (R. 766), and it concluded that "a strike to settle a dispute which a collective bargaining agreement provides shall be settled by an exclusive and obligatory alternative procedure constitutes a violation of the agreement". (R. 766). It reasoned that its conclusion "does not make meaningless the express abrogation of a no strike clause in the 1950-52 agreement" (R. 766); that the "right to strike was preserved with respect to all disputes not subject

²⁴ The foregoing provisions of the 1950 Agreement were carried forward into the 1951 Agreement, which became effective February 1, 1951 (Ex. 10, R. 118a, 241a).

to settlement by other methods made exclusive by the agreement" (R. 766-7); and though professing that "the Unions remained free from liability for spontaneous or 'wildcat' strikes" (R. 767), defined by that Court as "the kind of 'stoppages' and 'suspension of work' which the agreement made subject to the settlement procedure therein provided" (R. 767), it concluded that the strikes "resulted from localized labor disputes which were cognizable under the settlement procedure" (R. 767).

ARGUMENT

I. Strike Activity Pending Settlement of Disputes Under the Grievance Machinery of the 1950 Agreement was a Permissive, and Not a Prohibited, Activity Thereunder and Did Not Subject the Unions to a Damage Action Under Section 301 of the Act. The Sixth Circuit's Conclusion to the Contrary Is Unwarranted Under the Evidence and Applicable Law

The Unions contend now, as they did in the trial court and the Sixth Circuit, that the strike activity was not in violation of the 1950 Agreement and did not subject them to a damage action under the Act's Section 301.

Significantly, the Sixth Circuit admitted that the no-strike provisions in contracts antedating the 1950 Agreement "were superseded" and that the "right to strike" was "expressly preserved in the 1950-52 Agreement" (R. 764, 766); yet totally inconsonant therewith is the Sixth Circuit's antithetical conclusion that "a strike to settle a dispute which a collective bargaining agreement provides shall be settled by an exclusive and obligatory alternative procedure constitutes a violation of the agreement" (R. 766). Thus, the Sixth Circuit holds that pending settlement of a dispute there shall be no strike or work stoppage, thus negating

the very right to strike which it declared the contracting parties agreed had been preserved (R. 766) and thereby replacing into the Agreements the precise wording, namely, that "Pending the hearing of disputes, the Mine Workers shall not cease work . . .", which the contracting parties expressly covenanted had been "~~rescinded, cancelled, abrogated and made null and void~~". To the Sixth Circuit, the determination of the issue of contract violation "depends upon what effect the agreement to settle all local disputes in accordance with the 'Settlement of Local and District Disputes' procedure had upon the right to strike which was expressly preserved in the 1950-52 agreement" (R. 766).

The fallacy of the Sixth Circuit's conclusion is made manifest by the bargaining history between the 1950 Agreement's signatories, which was appropriately regarded as "enlightening" by the District of Columbia Circuit in *International Union, UMW v. National Labor Relations Board*, DC Cir., 257 F. 2d 211 (1958), when it held that the provision that disputes should be settled by grievance and arbitration procedures was not a binding agreement not to strike.

The Court will recall that the 1941 and 1945 Agreements, in the *settlement of disputes* section, committed miners to the covenant that "Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute" (*ante*; p. 8). It was at this posture in the bituminous coal industry's collective bargaining history that Congress enacted the Taft-Hartley Act on June 23, 1947, subjecting labor unions to various sanctions, including money judgments for breaches of contract as authorized by the Act's Section 301.

It had long been the judicial view that it was the employees' right to withhold their services and engage in work stoppages or strikes which gave to labor the necessary equality in the collective bargaining process. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184; and it had also been this Court's teaching that employees "can sell . . . their labor . . . upon such terms and conditions as they choose". *Hunt v. Cramboch*, 325 U. S. 821, 824. Congressional recognition of these employee rights are found in the Act's Section 7, while Section 13 commands that the right to strike is not restricted or waived except as Congress has "specifically provided" in the Act (see Appendix I, p. 29 and *post*, p. 21). Even though the collective bargaining scheme of Taft-Hartley seeks to reduce strikes and industrial unrest, its legislative history supports the position that the right to strike was preserved²⁵ and that whether a labor union and its members waived or limited the right to engage in a strike and what sanctions, if any, were to be imposed for the breach of any obligations agreed upon, remain appropriate subjects for free collective bargaining.²⁶ Faced with the damage actions sanctioned by Section

²⁵ *NLRB v. International Rice Milling Co.*, 341 U. S. 665, 673, fn. 8; quotes Senator Taft (93 Cong. Rec. 3835):

"So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining."

²⁶ In considering the question of enforcement of collective bargaining contracts against labor organizations, argument was advanced that such responsibility would result in labor's refusal to consent to inclusion of no-strike clauses in contracts but such an argument was rejected by the Senate Committee by declaring that inclusion of "no-strike" clauses in agreements "is certainly a point to be bargained over". Senate Report No. 105, 80th Cong., 1st Session, pp. 17-18.

301, UMW was no longer willing that the "no strike" and kindred clauses remain in the collective agreement. Hence, as a result of collective bargaining, the contracting coal operators and UMW signatories to the 1947 Agreement, bearing a July 7, 1947 date, agreed that it "shall cover the employment of persons employed in the bituminous coal mines covered by this Agreement during such time as such persons are *able and willing to work*" (R. 127a), and, omitting the no-strike and related clauses of the 1941 and 1945 Agreements, *by affirmative recitals*, made it positive that a strike or work stoppage was no longer a violation of the collective bargaining agreement. The 1947 Agreement expressly provided that (R. 129a):

"1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing *any 'no strike' or 'Penalty' clause or clauses or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void*",

and that likewise all District or Local Agreements providing for no-strike and related clauses were also "expressly repealed" and rendered inapplicable during the Agreement's term (R. 127a). By such affirmative recitals the Unions were exculpated from all legal responsibility for strikes by the assurance that such activity no longer could be regarded as breach of contract strikes. The 1947 Agreement, as shown herein (*ante*, p. 10), also provided that "stoppages . . . shall be . . . settled and determined exclusively by the" grievance machinery provisions. As the District of Columbia Circuit declared in the *International Union, UMW* case (257 F. 2d 211, 216), rescission in the 1947

Agreement of the no-strike and related clauses "was done to remove the danger that the union might be sued for breach of contract under the new statute".

As already noted, the 1948 Agreement (R. 126a, 248a) carried forward the 1947 Agreement and terminated by its own terms on June 30, 1949; and there is judicial recording that, upon expiration of the 1948 contract, UMW was enjoined by court decree from insisting upon inclusion of the "able and willing" clause in an agreement successor to the 1948 Agreement. *Penello v. International Union, UMW A*, DC, D.C., February 9, 1950, 88 F. Supp. 935, 942. That the "able and willing" clause was wholly separate from and "had no connection with the problem of 'no strike' and 'no stoppage' clauses" is affirmed by the District of Columbia Circuit in its *International Union, UMW A* case (257 F. 2d 211, 216), wherein it observed that:

"The Operators Negotiating Committee in 1950, in a letter written to Mr. Lewis in the course of the negotiations of the 1950 contract, demanded under heading (3) *no strike or stoppage clauses*, and under heading (4) the elimination of the 'able and willing' clause."

Thus, the 1950 contract, although eliminating the "able and willing" clause, expressly provided, in the precise language of the 1947 contract, for the rescission of all no-strike and related clauses. Subsections 1 and 3 of the "Miscellaneous" section of the 1950 Agreement (R. 106a) are in the same wording as they appeared in the 1947 Agreement (as quoted, *ante*, p. 10). Likewise, both the 1947 (R. 127a) and the 1950 (R. 104a) Agreements provide that

"any provision in District or Local Agreements providing for the levying, assessing or collecting

of fines or providing for 'no strike,' 'indemnity' or 'guarantee' clauses or provisions are hereby expressly repealed and shall not be applicable during the term of this Agreement."

The 1950 Agreement also contained subsection 4 of the article "Miscellaneous", which read (R. 106a):

"4. The United Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement."

In light of the Sixth Circuit's admission that the no-strike provisions in contracts antedating the 1950 Agreement "were superseded" and the right to strike "expressly preserved in the 1950-52 Agreement", its contradictory holding that pending settlement of a dispute there should be no strike, can be explained only by the specious argument that having expressly rescinded the previous no-strike provisions in subsection 1, the parties reinstated them in subsection 3.

Unless clear, positive and unequivocal language has lost its meaning, the contracting parties could not have in more definitive and unambiguous verbiage expressed their understanding and intent that the right to strike, proscribed by earlier contracts, was no longer waived but was reinstated. If the contracting parties intended that there should be no work stoppages pending settlement of disputes under the grievance machinery procedures, why should they have so studiously provided for rescission of such clauses and that they "should not be applicable"? It is both absurd and untenable

to argue that the contracting parties would in such positive and unequivocal wording have eliminated the no-strike provision and then in the same instrument intend, by implication, to reinstate it; but such is the Sixth Circuit's result. Since, as the District of Columbia Circuit professed in its decision interpreting the Agreement's language, subsection 1 was put into the 1947 Agreement (and later in the 1950 Agreement) "to remove the danger that the union might be sued for breach of contract under the new statute" (257 F. 2d 216), the result of the Sixth Circuit's conclusion is to render UMW's purpose in insulating it and its affiliates from damage actions under Section 301, as well as the contract's language, as meaningless and a nullity.

In its decision, the District of Columbia Circuit, in the *International Union, UMW* case (257 F. 2d 211), pointed out that the no-strike provisions of the 1941 and 1945 Agreements were rescinded "in subsection 1 because of the danger of lawsuits under the Taft-Hartley Act", and cogently inquired that "If they reinstated them in subsection 3, would the lawsuits be any less annoying or perilous to the union treasury?" (257 F. 2d 217). The District of Columbia Circuit appropriately rationalized that (257 F. 2d 217):

"It is hardly conceivable that a stoppage of work could occur except as a consequence of a dispute which would be cognizable under the grievance procedure of the contract",

and

"That being so, what was eliminated unequivocally in subsection 1 was restored completely in subsection 3, if subsection 3 was a 'no strike' agreement".

Finalizing its rejection of argument paralleling that employed by Benedict and the Sixth Circuit herein, the District of Columbia declared that (257 F. 2d 217):

"If we are to credit the parties with normal capacity to reason and express themselves, we cannot read subsection 3 as a 'no-strike' agreement."²⁷

The Sixth Circuit's holding is inconsonant with this Court's declaration in *NLRB v. Lion Oil Co.*, 352 U. S. 282, 293 (1957) that:

"Where there has been no express waiver of the right to strike, a waiver of the right during such period is not to be inferred."

It is noteworthy that in the Act's Section 13 is found the Congressional command that:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike".

²⁷ Despite its contrary view argued in *International Union, UMW v. National Labor Relations Board*, *supra*, which was rejected by the District of Columbia Circuit, the Board's holding prior thereto had constantly been that the renunciation of the right to strike "will not be found to exist *except when expressed in clear and unequivocal language*". *Textron Puerto Rico*, 107 NLRB 583; 587; *Consolidated Frame Co.*, 91 NLRB 1295, 1297; *California Portland Cement Co.*, 101 NLRB 1436, 1439.

Former Board Chairman Herzog in *National Electric Products Corp.*, 80 NLRB 995, stated:

"In the absence of an express provision to that effect, I do not see how such a clause can also be taken to disclose an intention by either party to include a pledge never to use self-help in the event of a serious violation of law by the other. If a contract does not preclude self-help in such circumstances, its use cannot constitute a breach of that contract . . ."

The foregoing statement was quoted with approval in the Intermediate Report in *Mastro Plastics Corp.*, 103 NLRB 511, 557.

Of Section 13 the District of Columbia Circuit declared in the *International Union, U M W A* case, *supra*, that:

"This section forbids a free interpretation of the Act itself in such a way as to find in it implicit inhibitions of the right to strike. It seems to us that the spirit of the section also is an admonition to deciding tribunals not to interpret ambiguous provisions of contracts as amounting to 'no strike' agreements." (257 F. 2d 218).

Further, the Sixth Circuit's result ignores completely the contract fact that "stoppages", as well as disputes, were to be settled under the grievance procedures. The contracting parties in subsection 3 manifested obvious recognition that stoppages would occur. It is significant that whereas the 1941 Agreement had expressly provided, in connection with the no-strike clause, that "Under no circumstances shall the Operator discuss the matter under dispute with the Mine Committee or any representative of the United Mine Workers of America during suspension of work in violation of this Agreement," the 1950 Agreement contained no such restriction, thus showing that when the contracting parties agreed that the right to strike was restored, they agreed further that pending strike activity the parties would negotiate settlement of matters in dispute.

With the contractual proscriptions against striking excluded, the right to strike, as the Sixth Circuit declared, was contractually preserved and recognized. In light of such declaration, to adopt the Sixth Circuit's further view that strike activity was violative of the agreement because of the language of subsection 3 would impose upon the Operators, and in the instant case upon Benedict, an intent to delude and defraud

the employees. Clearly an employee reading that the no-strike and related clauses had been deleted could conclude only that his right to strike had been restored. It is one thing to agree to process disputes under the grievance machinery, which was done in the instant case. It is an entirely different matter to say thereby there is agreement not to resort to a stoppage pending the dispute's settlement.

In *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U. S. 355, 363, this Court rejected an attempted "reform" of a collective bargaining agreement "to conform to" a tribunal's "idea of correct policy" and admonished against the emasculation of the agreement of contracting parties by ignoring "plain provisions of a valid contract". Application of such principle demonstrates fully the Sixth Circuit's error. The Sixth Circuit's conclusion finds challenge, too, in the principle that denies to a court the right to imply terms which "are inconsistent with express provisions". 12 Am. Jur., Contracts, Section 239, pp. 767-8; *Ferrolinc Corp. v. General Aniline & Film Corp.*, 7 Cir., 207 F. 2d 912, 926. Aptly stated are the words of Mr. Justice Cardozo in *Marchant v. Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 169 N. E. 386, 391, 393:

"Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent . . . No one is under a duty to resort to these conventional tribunals . . . except to the extent he has signified his willingness . . . [Contracting parties] . . . are not to be trapped by a strained and unnatural construction of words of doubtful import into an abandonment of legal remedies, unwilling and unforeseen."

To adopt the Sixth Circuit's distortion of the contracting parties' agreement would not be conducive

to the elimination of strike activity, but instead, would be invitatory to labor unions to withdraw from collective bargaining agreements provisions for settlement of disputes through grievance procedures.

The Sixth Circuit noted the inconsonancy of its decision with that of the District of Columbia Circuit, but cast its preference with the view of the dissenting judge in *International Union, UMW A v. NLRB*, *supra*, and mistakingly with the Fourth Circuit's *United Construction Workers v. Haislip Baking Co.*, 4 Cir., 223 F. 2d 872, and the First Circuit's *W. L. Mead, Inc. v. International Brotherhood of Teamsters*, DC, Mass. (1954), 126 F. Supp. 466, *aff'd*, 230 F. 2d 576 (R. 766).

When, in the instant case, the Sixth Circuit cast its agreement "with the dissenting judge in" the District of Columbia case, it necessarily approved the reasoning employed in the dissent (257 F. 2d 218) that the strike constituted "pressure tactics" which were "in violation of express contract provisions" (257 F. 2d 220)—reasoning which is not only contrary to the bargaining history of the 1950-52 contracts and to the specific language thereof, but reflects also the dissenting judge's total lack of familiarity with or concern for the Congressionally-declared policy that the right to strike shall be a subject for collective bargaining, that the Act's legislative history supports the view that the right to strike was preserved and so recognized by this Court in *NLRB v. International Rice Milling Co.*, 341 U. S. 665, 673, and this Court's standard expressed in *NLRB v. Lion Oil Co.*, that

"Where there has been no express waiver of the right to strike, a waiver of the right during such period is not to be inferred."

Furthermore, the unsoundness of the dissenting opinion—which the Sixth Circuit has adopted—is plenarily demonstrated in its statement that

“... the presence or absence of a ‘no strike’ clause is beside the point.” (257 F. 2d 219).

The Sixth Circuit’s agreement with the dissent, adopting its fallacies and infirmities, thus of necessity renders and stamps the Sixth Circuit’s conclusion as tainted, untenable and clearly erroneous.

The District of Columbia Circuit appraised the *Haislip* and *Mead* cases as “expressions which support the Board’s preference” (257 F. 2d 217), but declared that:

“Such a preference is, however, no justification for, by the process of benevolent interpretation, making a contract for the parties which, to a moral certainty, they did not make for themselves.” (257 F. 2d 217-8).

Such reasoning, Unions submit, is likewise apposite to the Sixth Circuit’s conclusion herein.

The Sixth Circuit’s use of the *Haislip* and *Mead* cases in support of its conclusion is totally abortive. Neither *Mead* nor *Haislip* contained positive covenants, as does the 1950 Agreement, that prior no-strike clauses are rescinded and made null and void; they contained only arbitration procedure provisions; and it is noteworthy that in *Mead* the District Court’s opinion declares that:

“An arbitration clause is not the same thing as a ‘no strike’ clause, and cannot . . . have such broad consequences.” (126 F. Supp. 467).

and that there was no testimony "that the Union specifically wanted to protect its right to strike" (126 F. Supp. 469).

Previous to its holding in the instant case, the Sixth Circuit had concerned itself, in *Garmcada Coal Co. v. International Union, UMW*, 6 Cir., 230 F. 2d 945, in a damage action against UMW, a local union and a district, with the right to strike under the same 1950 Agreement involved in the instant case; and it sanctioned the District Court's reasoning that therein the miners were "~~pursuing their right to strike regardless of the provisions of the~~" Agreement. (DC, E.D. Ky., 1954, 122 F. Supp. 512, 518) When it is considered that the trial court in *Garmcada* incorporated in its decision the "Settlement of Local and District Disputes" section of the 1950 Agreement, the conflict between the Sixth Circuit's conclusion herein and its approval of the District Court's reasoning in *Garmcada* is readily apparent.

The Sixth Circuit seeks to justify its holding by contending that its conclusion "does not make meaningless the express abrogation of a no strike clause in the 1950-52 agreement" and that the "right to strike was preserved with respect to all disputes not subject to settlement by other methods made exclusive by the agreement", noting that "spontaneous or 'wild-cat' strikes . . . would be the kind of 'stoppages' and 'suspensions of work which the agreement made subject to the settlement procedure therein provided" (R. 766-7). But it is noteworthy that when the contracting parties in the 1950-52 Agreements rescinded and made inapplicable and null and void the no-strike clauses of earlier contracts, they preserved the right to strike totally and unequivocally. They did not, as the Sixth Circuit erroneously and untenably reasoned,

agree that the right to strike was preserved *only* "with respect to all disputes not subject to settlement by other methods made exclusive by the agreement". The declaration of the *partial* preservation of the right to strike is the result of the Sixth Circuit's reformation of the contract; it is in total conflict with the understanding and intent of the contracting parties signatory to the 1950 contract and therein expressed in positive and unequivocal language; and it offends the rule already noted that courts, like administrative tribunals, "cannot ignore the plain provisions of a valid contract" (*Colgate-Palmolive-Peet Co. v. NLRB*, 338 U. S. 355, 363).

The Sixth Circuit's holding and decision that strike activity constituted a violation of the 1950 Agreement are unwarranted under the evidence and applicable law.

CONCLUSION

For the foregoing reasons, the Unions (Petitioners) submit that this Court should answer the Question Presented (*ante*, p. 3) in the negative, reverse the Court of Appeals' holding that the strikes constituted violations of the 1950 Agreement, and reverse and set aside the Court of Appeals' judgment of September 26, 1958, in so far as said judgment provides that "the case is remanded solely for a redetermination in accordance with the views expressed in the opinion [of the Sixth Circuit], of the amount of damages" Benedict is entitled to recover from Petitioners, and enter judgment for the Unions, and each

of them, or, in the alternative, remand the case for entry of judgment in accordance with this Court's determination of the question of law involved.

Respectfully submitted,

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APPENDIX I

Labor Management Relations Act, 1947, Section 7
(29 USCA 157):

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Labor Management Relations Act, 1947, Section 13
(29 USCA 163):

Right to strike preserved

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Labor Management Relations Act, 1947, Section 301
(29 USCA 185):

Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States

having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

APPENDIX II

**"National Bituminous Coal Wage Agreement
Effective April 1, 1945**

"13. * * *

**For the duration of this Agreement no strikes shall
be called or maintained hereunder."**

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1959

No. 18

JOHN L. LEWIS, HENRY G. SCHMIDT
and JOSEPHINE ROCHE, as Trustees
of the United Mine Workers of America
Welfare and Retirement Fund

PETITIONERS

V.

BENEDICT COAL CORPORATION

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

I.

PRELIMINARY STATEMENT

Your respondent accepts the petitioners' presentation of the opinions below, the jurisdiction of this court and the statutes involved as contained in Paragraph I, II, and III of petitioners' brief. In this brief the Benedict Coal Corporation will be referred to as "Benedict" and the United Mine Workers of America and its District 28 will be referred to collectively as "The Union."

II.

QUESTION PRESENTED

Your respondent does not accept the statement of the

question presented by the petitioners and states the following as a counter-statement of the question involved:

Can the Benedict Coal Corporation use the same defense against the Trustees of the Welfare Fund that it could use against the defendant Unions, when an action is brought against Benedict by the Trustees to recover money allegedly due and owing the trust fund, when the trust fund is created by an integrated contract instrument whose respective provisions are interdependent and when Benedict among other things, agrees, to pay certain money into the fund in return for the agreement of the defendant Unions to use certain contractual provisions for the adjustment of disputes and (for a part of the period involved) for their further promise to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances, when an alleged breach of the agreements by the defendant Unions impair the ability of Benedict to pay into the fund.

.III.

STATEMENT OF THE CASE

Your respondent supplements the Statement of the Case as set out by the petitioners in these regards:

The 1950 and the 1952 agreements had the following provisions:

"INTEGRATED INSTRUMENT"

"This Agreement is an integrated instrument and its respective provisions are interdependent and shall be effective from and after March 5, 1950." (R. 107a)

The 1950 contract also had provisions for the settlement of local and district disputes. It further provided:

"3. The contracting parties agree that, as a part of the consideration of this contract, any and all dis-

"R" refers to the printed record.

putes, stoppages, suspensions of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided, in the "Settlement of Local and District Disputes" section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in industry.

4. The United Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work or strikes or lockouts pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement." (R. 106a)

The 1952 agreement eliminated Clause 4 above and amended subsection 3 to read as follows:

"3. The United Mine Workers of America and the operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts." (R 113a).

In its answer filed to the original action brought by the trustees, Benedict denied liability for the sum sought on several grounds which we consider material to the question presented to this court. The pertinent part of Benedict's answer to the original complaint was as follows:

"It is true that the Defendant hasn't paid, to the Plaintiff the alleged royalty for all the tons of coal produced, but Defendant states that during the last five years it has been operating under a contract with the United Mine Workers of America and that the United Mine Workers of America has repeatedly broken this contract to Defendant's damage. The United Mine Workers of America has had numerous unlawful strikes, has refused to arbitrate differences, and this refusal has caused a number of unlawful strikes and these Defendants have been unable to pay the alleged royalties because of the damages suffered by reason of the breach of the contracts by the United Mine Workers of America. That the details of said breaches will be set out in supplemental pleadings and in a cross-claim or counter-claim to be filed in this cause, That during the period of Defendant's operation under contracts with the United Mine Workers of America, the said United Mine Workers of America has caused strikes to be held at Defendant's mines which amounted to secondary boycotts as prohibited by the Labor Management Relations Act and which strikes further damaged Defendants and made them unable to pay the welfare royalty and the United Mine Workers of America is indebted to the respondent for the damage done by the secondary boycotts, details of which will be hereinafter set out. That the Plaintiff in this action being the beneficiary of a contract entered into between the Defendant and the United Mine Workers of America is bound by all the defenses that this defendant may assert against the United Mine Workers of America and, therefore since the United Mine Workers of America, by its breaches of contract and by its secondary boycotts has damaged Defendant and made Defendant unable to pay its welfare payments, the Plaintiff in this action is not entitled to recover anything. Furthermore, the United Mine Workers of America is indebted to Defendant in excess of any

sum that this Defendant may be indebted to the Plaintiff." (R. 18a, 19a).

It was the position of Benedict that the obligation by Benedict to make payments to the trustees was dependent upon performance by the United Mine Workers and District 28 of their obligations to Benedict and that the trustees, being beneficiaries of the agreement, were subject to the defenses arising from the conduct of the United Mine Workers of America and District 28.

IV.

SUMMARY OF ARGUMENT

The trust fund involved was created by the contract between Benedict and the Union. The provisions of this contract are interdependent. Benedict's obligation to pay royalty into the fund is dependent upon the performance of the obligations incurred by the Union. In so far as the fund provisions are concerned, the trustees are the beneficiaries of this contract.

The trustees claims against Benedict are subject to any defenses which Benedict may assert against the Union. These defenses would include non-performance, failure of consideration or set-off.

The Union breached the same contract which created Benedict's obligation to make payments to the fund. These breaches of contract by the Union are adequate defenses in this action by the trustees. It is equitable and just to permit the amount that Benedict was damaged by the Union's breach of contract to be set-off against what Benedict should be required to pay into the fund.

The petitioners' position that unpaid royalties became impressed with the trust upon the computation of the production of coal and that non-performance of the contractual obligation by the Union does not alter this obligation to pay the trustees resulting from the coal produced is untenable. It ignores the plain provisions of the contract

which indicate that the obligations are interdependent. The Union being in default in its performance of the contract, there was no obligation on the part of Benedict upon which a trust could attach. The production of coal was not the sole condition which Benedict placed upon creation of the trust res. The performance by the Union of its contractual obligations was also a condition.

The petitioners' contention that the allowance of an off-set effects the revocation of an irrevocable trust is untenable because it is based upon the same fundamental error.

The petitioners' interpretation of the "interdependent" clause of the contract is at variance with settled rules of interpretation.

The petitioners' contention that the legal implications of the Sixth Circuit's decision is to effect a satisfaction of the Union's obligation out of assets held in trust for employees and their families is also untenable. The Union being in default in its obligations, there is no obligation on the part of Benedict to pay into the fund, the royalties are not due and owing and would not be "an asset held in trust."

V.

ARGUMENT

1. The Basic Position of the Respondent

The trust fund involved was created by the contract between Benedict and The Union. The provisions of this contract are interdependent. It is fundamental that Benedict's obligation to pay royalty into the fund is dependent upon the performance of the obligations incurred by the other contracting parties, the International Union and District 28.

The trustees are not parties to this contract between Benedict and The Union. However, in so far as the fund provisions are concerned, the trustees are the beneficiaries

of this contract.

In Restatement of the Law of Contracts, 1932 Ed.:

**“Section 133. DEFINITION OF DONEE BENEFICIARY,
CREDITOR BENEFICIARY, INCIDENTAL
BENEFICIARY**

* * * * *

(3) Where it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promise is to benefit a beneficiary under a trust and the promise is to render performance to the trustee, the trustee, and not the beneficiary under the trust, is a beneficiary within the meaning of this Section.”

Since the trustees are beneficiaries of this contract, their claim against Benedict is subject to any defenses which Benedict may assert against the Union. These defenses would include non-performance, failure of consideration or setoff.

In Restatement of the Law of Contracts, 1932 Ed.:

**“Section 140. AVAILABILITY AGAINST A
BENEFICIARY OF THE PROMISOR'S
DEFENSES AGAINST THE PROMISEE:**

“There can be no donee beneficiary or creditor beneficiary unless a contract had been formed between a promisor and promisee; and if a contract is conditional, voidable, or unenforceable at the time of its formation, or subsequently ceases to be binding in whole or in part because of impossibility, illegality or the present or prospective failure of the promisee to perform a return promise which was the consideration for the promisor's promise, the right of a donee beneficiary or creditor beneficiary under the contract is subject to the same limitation.”

In 13 Corpus Juris, 699:

(Section 700) “5. Contract for Benedict of Third

Person. One who seeks to take advantage of a contract made for his benefit by another must take it subject to all legal defenses and inherent equities arising out of the contract, such as the fraud of the party procuring it, the nonperformance of conditions, or the right to a setoff, unless the element of estoppel has entered."

In Williston on Contracts, Volume Two, Section 395:

"A more difficult case arises where the defense does not relate to the origin of the contract, but is based on supervening circumstances, such as non-performance by the promisee of a counter-promise made by him, increase of risk in insurance, or discharge by the promisee by release or rescission. The defense of non-performance should be available against the third person whether he is a donee beneficiary or a creditor beneficiary. Such a defense is properly based on failure of consideration. As the substantial matter the parties had in mind was the performance of the promises the defendant promisor has in substance not received what he bargained for. Under these circumstances it is unjust to allow a mere donee to enforce the promise; and if the third person is a creditor he is not entitled to any greater right than his debtor had." (pp. 1137-1138).

In 12 Amer. Jur. 842:

"Even in jurisdictions which recognize the right of a beneficiary to enforce the contract, the agreement between the promisor and promisee must possess the necessary elements to make it a binding obligation—in other words, it must be a valid agreement between the parties to enable a third person, for whose benefit the promise is made, to sue upon it. His rights depend upon, and are measured by, the terms of the contract. The right of a third person for whose benefit a promise is made is affected with all the infirmities of the contract as between the parties to the Agreement. Unless the third person has been induced

to alter his position by relying in good faith upon the contract made for his benefit or unless a novation has been effected, the promisor may set up any defense or equity against him which he could have set up as against the promisee. Thus, in an action by the beneficiary, fraud on the part of the promisee, mistake, and want of consideration may be asserted by the promisor."

It is Benedict's position in this case that the Union breached the same contract which created Benedict's obligation to make payments to the fund. The breaches of contract by the Union are adequate defenses in this action by the trustees.

In 13 Corpus Juris, 627:

"Dependent Covenants or Promises. Where promises which form the consideration for each other are concurrent or dependent, the failure of one party to perform will discharge the other, and one cannot maintain an action against the other without showing performance, or a tender of performance, on his part, unless such performance has been excused, the general rule being that a person who has himself broken a contract cannot recover on it."

In 12 Amer. Jur. 852:

"Where the acts or covenants of the parties are concurrent and are to be done or performed at the same time, the covenants are dependent and neither party can maintain an action against the other without performance on his part."

In Restatement of Contracts, 1932 Ed. Section 274:

"Failure of Consideration as a Discharge of Duty. (1) In promises for an agreed exchange, any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange even though his promise

is not in terms conditional. An immaterial failure does not operate as such a discharge.

(2) The rule of Subsection (1) is applicable though the failure of performance is not a violation of legal duty."

It is immaterial that Benedict attempted to continue working under the contract. In 13 Corpus Juris 699:

"It is not necessary that defendant shall have rescinded his contract in order to prevent his assertion of non-performance by plaintiff as a defense to an action thereon, or to enable him to plead a failure of consideration."

It is true that Benedict attempted to continue operating under the contract. They were damaged by the breaches of contract by the Union, and this affected their ability to pay into the Fund. It is, therefore, equitable and just to permit the amount that they were damaged by the breach of contract to be offset against what Benedict should be required to pay into the Fund.

2. The Contentions of the Petitioner

(1) The petitioners first argue that unpaid royalties become impressed with the trust upon the coal production from which the royalty is computed and that non-performance of the contractual obligation by the Union does not alter the legal obligation to pay the trust res resulting from the coal produced. To adopt this position is to ignore the other plain provisions of the contract which show that the obligations are interdependent. No trust attaches to any obligation to pay at the time of the production of the coal because under the facts of this case, the royalty is not due and owing. Our position is simply that the royalty is not due and owing since Benedict's obligation to pay to the fund is dependent upon the Union's performance of other clauses of the contract. The Union was in default in its performance of these other clauses.

It is immaterial what position the trustees claim they

are taking in this action. In actuality, the trustees are the beneficiaries of the contract and subject to the defenses which Benedict has against the Union. Our position is concisely stated in this portion of the opinion by the Sixth Circuit:

"To thus construe the royalty provisions as being independent of the obligations assumed by the Unions would, be inconsistent with the agreement considered as an entirety. The 1950-52 agreement specifically provided: 'This agreement is an integrated instrument and its respective provisions are interdependent' Further, the provision requiring that the parties resort to the specified procedure for the settlement of local disputes is stated to be 'part of the consideration of this contract.' Hence we conclude (fol. 775) that the obligation to make payments to the Trustees was dependent upon performance by the Unions of their obligations, and consequently that the district court was correct in ruling that the Trustees were third party beneficiaries of the contract and subject to the defenses arising from breaches by the Unions." (R. 772, 773, *John L. Lewis, et al v. Benedict Coal Corporation*, 259 Fed. 2d 346).

The petitioners then assert that the sole condition which Benedict placed upon the creation of the trust res was the production of coal. In this assertion the petitioners again disregard the rest of the contract. The performance by the Union of its contractual obligations was also a condition. The very default which Benedict complained about was expressly stated to be "as a part of the consideration of this contract" in the Miscellaneous Section of the 1950 contract. (R. 106a). By the clear terms of the contract the production of coal was not the sole condition to the creation of the trust res.

In that portion of their brief, petitioners cite *Lewis v. Quality Coal Corporation*, 243 Fed. 2d 769. It is noted that in that case, the court expressly stated that plaintiff's title and their right to recover the money was not controverted. There was no question in that case as to non-perform-

ance by the Union of an interdependent obligation nor was there any question as to whether the money was due and owing.

We also take issue with petitioners' contention that Benedict's obligation to deliver to the trustees the trust property is a transaction wholly separate from situations upon which Benedict's claims against the Unions are predicated. As before stated, the obligations are interdependent.

(2) The petitioners also contend that the allowance of an offset effects the revocation of an irrevocable trust. This contention is based upon the same fundamental error. If the Union is in default on its performance, then Benedict is not obligated to pay to the fund. If the money is not due and owing then there is no revocation of any vested trust res.

(3) The petitioners then argue that the Sixth Circuit's conclusion that Benedict's obligation to the trustees was dependent upon Union performance is based upon a misconception of the agreement and petitioners on page 20 of their brief gave their conception of the meaning of the language:

"This instrument is an intergrated instrument and its respective provisions are interdependent."

The petitioners insist that the meaning of these words is merely to "demand the assurance that the agreement signed was the entire agreement which the Union had signed with each contracting operator and, likewise that no provision expressed in the national or industry-wide agreement had been deleted for the benefit of any one or more of such signatories." Your respondent's position is that the phrase merely means what it says. In Webster's New Collegiate Dictionary:

"interdependent Mutually or reciprocally dependent."

The petitioners' construction of this phrase is at vari-

ance with settled rules of interpretation. 12 Am. Jur. 758:

"Words will be given their ordinary meaning when nothing appears to show that they are used in a different sense and no unreasonable or absurd consequences will result from doing so. Words chosen by the contracting parties should not be unnaturally forced beyond their ordinary meaning or given a curious, hidden sense which nothing but the exigency of a hard case and the ingenuity of a trained and acute mind can discover."

4. Petitioners contend that the legal implication of the Sixth Circuit's decision is to effect a satisfaction of the Union's obligation out of assets held in trust for the employees and their families. This contention has the same basic infirmity. If the Union has defaulted on its interdependent obligations, then there is no ascertained obligation on the part of Benedict to pay into the fund. The royalties are not due and owing and would not be "an asset held in trust."

This is not analogous to an employers off setting its claim for damages against the Union against wage claims of employees. The Trustees rights to collect royalties arise solely from the collective bargaining agreement. This collective bargaining agreement is the contract that has been breached. The employees rights to wages arises not only from the collective agreement but also from the individual contract of hire between the company and each separate employee.

It may be true that a trust represents a device which deserves to be encouraged and protected, but your respondents insist that this is no reason to depart from fundamental principles of contract.

CONCLUSION

Your respondents respectfully submit that the decision of the Sixth Circuit in this cause should be sustained and that this cause be remanded in accordance with instruc-

tions heretofore set out by the Sixth Circuit.


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Office-Supreme Court, U.S.

SEP 23 1959

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OCTOBER TERM 1959

NO. 19

**UNITED MINE WORKERS OF AMERICA and
UNITED MINE WORKERS OF AMERICA,
DISTRICT 28 PETITIONERS**

V.

BENEDICT COAL CORPORATION RESPONDENT

RESPONDENT'S BRIEF

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Supreme Court of the United States

OCTOBER TERM 1959

NO. 19

UNITED MINE WORKERS OF AMERICA and
UNITED MINE WORKERS OF AMERICA,
DISTRICT 28 PETITIONERS

V.

BENEDICT COAL CORPORATION RESPONDENT

RESPONDENT'S BRIEF

I. PRELIMINARY STATEMENT

Your respondent accepts the petitioners' presentation of the opinions below, the jurisdiction of this Court, the statutes involved and the question presented as contained in Paragraphs I, II, III, and IV of petitioners' brief. In this brief the Benedict Coal Corporation will be referred to as "Benedict", the United Mine Workers of America will be referred to as "UMW", and United Mine Workers of America, District 28, will be referred to as "District 28".

II. STATEMENT OF THE CASE

1. The Trial Proceedings and the Sixth Circuit's Judgment

Your respondent adds the following to this portion of the petitioners' statement of the case.

The 1950 contract contained provisions for grievance machinery procedures for the settlement of disputes. (R. 104a, 105a). The miscellaneous section of the 1950 agreement had this further provision by which the parties agreed that any and all disputes, etc., would be settled and determined exclusively by the machinery provided:

"3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the "Settlement of Local and District Disputes" section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry." (R. 106a)

The miscellaneous section of the 1950 Agreement had this further clause:

"4. The United Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement." (R. 106a)

The 1952 Agreement amended its miscellaneous section by striking sub section 4 and amending sub section 3 to read as follows:

"The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Local and District Disputes" section of this Agreement unless national in character in which event the

parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts." (R. 113a, 114a)

In its answer and cross claim with amendments thereto, Benedict also alleged facts showing that the strikes of February 8, 1952, April 25 and 26, 1952, (Campbell Strikes) and that the strike of May 18-30, 1953, (The Big Mountain Strike) were secondary boycotts in violation of Section 303 of the Labor Management Relations Act, in addition to being breaches of the contract. (R. 19a, 31a, 32a, 45a). The trial court in its charges submitted to the jury the additional issue as to whether these above noted strikes were also secondary boycotts. (R. 722a, 723a, 724a, 729a, 730a, 731a)

The Circuit Court of Appeals, having found these strikes to be contractual violations, found it unnecessary to consider whether these particular strikes also violated the Labor Management Relations Act of 1947. (R. 767a, U.M.-W.A. et al v. Benedict Coal Corporation, 259 Federal (2d), 346, 351).

2. THE FACTS

a. The alleged Strike Activity and The Sixth Circuit's Holdings Relative Thereto

Your respondent adds the following to the above portion of the petitioners' statement of the facts. It is true that in each of the strike situations the miners returned to work. However in some of these situations, before the disputes were settled, the company had to "cave in". (R 160a, 173a, 174a)

In all cases except the water strike Benedict tried to arbitrate and they were turned down. (R. 215a).

b. The Collective Bargaining History and the 1950 Agreement

Your respondents deny that the 1957 agreement "by

affirmative recitals made it positive that a strike or work stoppage was no longer a violation of the "collective bargaining agreement", as stated on Page 9 of Petitioners' Brief. The 1947 Agreement merely repealed the "no-strike" provision in district or local agreements and provided further:

"Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any "no strike" or "Penalty" clause or clauses or any clause denominated "Illegal Suspension of Work" are hereby rescinded, cancelled, abrogated and made null and void." (R. 129a)

The rescission clause of previous "no strike" agreements was also in the 1950 agreement. (R 106a). These changes were not ignored by the Sixth Circuit which in its opinion stated:

"This conclusion does not make meaningless the express abrogation of a no strike clause in the 1950-52 agreement. The right to strike was preserved with respect to all disputes not subject to settlement by other methods made exclusive by the agreement. Moreover, the Unions remained (fol.770) free from liability for spontaneous or "wildcat" strikes. Such spontaneous strikes would be the kind of "stoppages" and "suspensions of work" which the agreement made subject to the settlement procedure therein provided." (R 776a; UMW v. Benedict Coal Corporation 259 Fed. 2d 346).

There was no recognition in the 1950 Agreement of the right to strike if the strike was for the purpose of settling a dispute. The 1950 Agreement expressly stated that all disputes would be settled **exclusively** by the machinery provided in the contract (R. 106a). (Bold face ours)

SUMMARY OF ARGUMENT

The contracts involved contain express, obligatory and

exclusive procedures for the settlement of disputes. The calling or use of a strike as an alternative method of settling disputes is a violation of the contracts.

The intent and purpose of the contracts involved as shown in the Preamble to the 1950 contract is to promote and improve industrial and economic relationship in the bituminous coal industry. The interpretation rendered by the Sixth Circuit is in keeping with this intent and purpose, and with the applicable legal principles requiring a regard for such intent and purpose. The adoption of the appellants' interpretation of the contract would make meaningless the express language of the 1950 contract which requires that all disputes be settled exclusively by the machinery provided in the contract. The subsequent provisions in the 1952 contract would also be made meaningless. The interpretation which the parties themselves have put upon the 1950 contract indicates that strikes for dispute settling purposes were considered violations of the contracts.

The petitioner's basic contention is that the clause in the 1950 contract which "rescinded, abrogated and made null and void" previous "no-strike" clauses gave to the union a positive right to strike even though the strikes are used as a method of settling disputes. This rescission clause in the 1950 contract merely puts the parties in the same position as though there had been no previous "no-strike" clauses. This rescission clause gave no right to strike if the strike is used to settle disputes in violation of other positive provisions of the contracts.

The petitioners rely upon the majority opinion in *International Union, United Mine Workers of America versus National Labor Relations Board*, 257 Fed. 2d 211. The interpretation of the contract by the two judges constituting the majority in that case is at variance with the interpretation given the same contract by the dissenting judge and the National Labor Relations Board in that same case, and by the Sixth Circuit in this case. It is also at variance with interpretations given to similar

clauses of other contracts by the Fourth Circuit and the First Circuit. This interpretation relied on by petitioners also fails to give effect to all the language and to every clause of the contracts involved. The case of *NLRB v. Lion Oil Company*, 352 U.S. 282, relied on by petitioners, is not in point.

ARGUMENT

(1). A strike to settle a dispute which a collective bargaining agreement provides shall be settled by an exclusive and obligatory alternative procedure, constitutes a violation of the agreement.

The issue in this case is not whether a mere strike is a breach of the 1950 and 1952 contracts, but the question is whether the use of strikes to settle disputes or enforce demands is a breach of the above agreements. Your respondent contends that strikes called or used for such purposes are direct violations of positive provisions of the contracts.

The pertinent parts of the 1950 contract involved on this question are as follows:

"Settlements of Local and District Disputes"

Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

1. Between the aggrieved party and the mine management.
2. Through the management of the mine and the Mine Committee.
3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the service of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement." (R104a, 105a).

* * * * *

3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the "Settlement of Local and District Disputes" section of this agreement; or if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry.

4. The United Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppage of work by strike or lockout pending adjustment or adjudication of dis-

putes and grievances in the manner provided in this agreement." (R106a).

Subsection 4 of the 1950 agreement was struck out of the 1952 agreement and Subsection 3 was amended to read as follows:

"3. The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Local and District Disputes" section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts." (R113a, 114a).

The Sixth Circuit correctly held that strikes to settle disputes were breaches of the above portions of the contracts, in the following portion of their opinion:

"With all respect for the majority view expressed in the latter decision, we agree with the dissenting judge in that case, and with the decisions in the Haislip and Mead cases; that a strike to settle a dispute which a collective bargaining agreement provides shall be settled by an exclusive and obligatory alternative procedure constitutes a violation of the agreement." United Mine Workers of America et al vs. Benedict Coal Corporation, 259 Fed. Rep 2d, 346 (R. 766)

(a). The purpose and intent of the contracts.

The interpretation by the Sixth Circuit is in keeping with the purpose and intent of the contracts. The preamble to the 1950 contract sets out its intent and purpose and among other things provides:

"It is the intent and purpose of the parties hereto that this agreement will promote and improve industrial and economic relationship in the bituminous coal industry and to set forth herein the basic agreements covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed in the bituminous coal mines covered by this agreement." (R 89a)

This portion of the 1950 contract was preserved by the 1952 contract. (R 108a). The industrial and economic relationship in the bituminous coal industry is promoted by the settlement of disputes by contractual grievance machinery rather than by brutal and wasteful strike methods. That is the intent and the purpose of the contract. A construction of the contract which permits the use of strikes as an alternative method of settling disputes is in derogation of the positive and clear terms of the contract and in direct opposition to its intent and purpose. Such a construction as urged by the petitioners would be a deterioration and retrogression of the industrial and economic relationship in the bituminous coal industry.

The intent of the contracting parties was well expressed by Judge Burger in his dissenting opinion in *International Union, United Mine Workers of America et al vs. National Labor Relations Board*, 257 Fed. 2d, 211:

"They are the words of enlightened union and management leaders who intend to abandon brutal and wasteful methods and substitute negotiation and arbitration as a means of settling disputes."

(b). The governing principles of law. •

The interpretation of the contract by the Sixth Circuit is in keeping with established principles of law. In 12 Am. Jur., 776:

"The spirit and purpose of an agreement as well as its letter must be regarded in the interpretation and

Application thereof."

See also Restatement of the Law of Contracts, Section 236(b).

In 12 Am. Jur. 773:

"All provisions should, if possible, be so interpreted as to harmonize with each other."

See also Restatement of the Law of Contracts, Section 235(c).

The adoption of the petitioners' construction of these contracts would make meaningless the grievance machinery clauses of the contracts, subsections 3 and 4 of the miscellaneous section of the 1950 contract and subsection 3 of the Miscellaneous Section of the 1952 contract. These portions of the contracts use positive words and the duties assumed thereunder are not mere implications. The term "exclusively" used in the 1950 contract has a positive meaning. The third paragraph in the miscellaneous section in the 1952 contract has a positive meaning. To imply that the contracts permit the use of strikes as an alternative method of settling disputes would void these express and positive provisions. Such an interpretation would be variance with settled principles of law. In 12 Am. Jur. 774:

"Such an interpretation must be adopted as will render the whole agreement operative, if it can consistently and reasonably be done. So far as possible, effect will be given to all the language and to every clause of the agreement. No word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument. An interpretation which gives reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable."

In Restatement of the Law of Contracts, Section 236.

"Secondary Rules Aiding Application of Standards of

Interpretation

Where the meaning to be given to an agreement or to acts relating to the formation of an agreement remains uncertain after the application of the standards of interpretation stated in Section 230, 233, with the aid of the rules stated in Section 235, the following rules are applicable:

(a) An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect.

(c) The interpretation by the parties.

It is also apparent that the parties themselves considered strikes or work stoppages for the purpose of settling disputes as contractual violations. During the trial in the District Court the petitioners introduced in evidence a letter dated October 24, 1951, from the officers of the United Mine Workers of America to all members, committeemen and officers of all local unions, United Mine Workers of America:

Dear Sirs and Brothers:

During the past year a wave of unauthorized local strikes or work stoppages occurred in various Districts. In nearly all of these strikes or stoppages the machinery incorporated in joint agreements for the consideration and disposition of grievances was not invoked. The International Executive Board, now in session in Washington, D. C., has given consideration to the implications involved in these strikes or stoppages and reached the following conclusion thereon:

"1. These unauthorized strikes adversely affect the contractual relationships between the United Mine Workers of America and the Coal operators.

"2. Unauthorized strikes cause unnecessary loss of earnings to our members, work hardship upon their

families and are not beneficial to the interests of the communities wherein they occur.

"3. Unauthorized strikes reflect discredit upon our organization's sixty-year record of honoring contractual provisions and result in strained labor relations between the parties signatory to the joint agreements.

"4 In some instances these unauthorized work stoppages have created situations wherein union operations have not been able to meet their commitments and this resulted in these operations losing business to competitors.

"5. The joint agreements between our organization and the coal operators contain established machinery for the adjustment of disputes between the parties signatory thereto, which eliminates the necessity for calling strikes.

"6. These unauthorized strikes not only endanger the stability of the coal industry, but encourage the operators to demand punitive clauses in wage agreements.

"On the basis of the foregoing conclusions, the International Executive Board, by unanimous vote, urges all members, local union officers and committeemen, district and international officials to not only refrain from participation in these unauthorized strikes, but to use their efforts and influences to prevent occurrence of said unauthorized strikes in contravention of the International Constitution and in direct opposition to the established policies of the United Mine Workers of America.

"We express the hope that the policies outlined herein will be followed in the best interest of our organization and our membership.

**"On behalf of the International Executive Board,
United Mine Workers of America.**

John L. Lewis
President.

Thomas Kennedy,
Vice-President.

John Owens,
Secretary-Treasurer.

(Def. Exhibit 31, R 500a, 501a) (Bold face supplied.)

Benedict's Vice-President, Guy B. Darst, also considered these stoppages as contract violations; as he had threatened to sue several times. (R 205a).

In Restatement of the Law of Contracts, Section 235 (c):

"(c) If the conduct of the parties subsequent to a manifestation of intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation."

(d.) The basic fallacy in petitioner's position.

The petitioners' basic contention is that the cancellation of previous "no-strike" clauses make strike activity permissive even though the strikes are used to settle disputes and enforce claims against the company and even though such use of strikes contravenes the positive provisions contained in the arbitration and the miscellaneous sections of the 1950 and 1952 contracts. This position is untenable for several reasons.

The petitioners first ignored the meaning of the words, "rescinded, canceled, abrogated, and made null and void." To "rescind" a previous "no-strike" clause is not to positively state that the unions are permitted to strike to settle disputes in contravention of other positive parts of the contract. These words, "rescinded, canceled, abrogated, and made null and void" merely void or delete previous "no-strike" clauses from the 1950 agreement and put the parties in just the same position they would be in if no such clause had been in previous agreements.

In Words and Phrases, Permanent Edition, Volume 37, Page 151:

"To ~~re~~-cind" a contract is not merely to terminate it, but to abrogate and undo it from the beginning; not merely to release the parties from further obligation to each other in respect to the subject of contract, but to annul the contract and restore parties to relative positions which they would have occupied if no such contract had ever been made. *Friedman v. Kennedy*, D.C.Mun.App., 40 A.2d 72, 74."

See other definitions, "Words and Phrases", Volume 37, Pages 150, 151, 152.

In "Words and Phrases", Permanent Edition, Volume 6, Page 35:

"The word 'canceled' means to make void or invalid. *Clegg v. Schvaneveldt* (Utah) 8 P(2d) 620, 621." See other definitions Pages 33-41.

When we give the term, "rescinded, canceled, abrogated and made null and void" its proper meaning, then the reasoning of the Fourth Circuit in *United Construction Workers vs. Haislip Baking Company*, 223 Fed. Rep. 2d, 872, and of the First Circuit in *W. L. Mead, Inc. vs. International Brotherhood of Teamsters*, 230 Fed. Rep. 2d, 576, is appropriate to the construction of the contract which we have in this case.

And the Sixth Circuit further held:

"This conclusion does not make meaningless the express abrogation of a no-strike clause in the 1950-52 agreement. The right to strike was preserved with respect to all disputes not subject to settlement by other methods made exclusive by the agreement. Moreover, the Unions remained (fol. 770) free from liability for spontaneous or "wildcat" strikes. Such spontaneous strikes would be the kind of "stoppages" and "suspensions of work" which the agreement made subject to the settlement procedure therein pro-

vided." (R 766; U.M.W.A. et al. vs. Benedict Coal Corporation, 259 Fed. Rep. (2d) 346.)

The rescission clause relied on by petitioners is not a positive statement permitting the strikes for the purpose of settling disputes in contravention of the other clauses of the contract.

The petitioners rely upon the majority opinion in International Union, United Mine Workers of America vs. National Labor Relations Board, 257 Fed. Rep. 2d, 211. The majority of that Court in sustaining their interpretation of the contract, gave no effect to subdivision 3 of the miscellaneous clauses of the 1950 agreement and termed it a mere "gentleman's agreement." This interpretation is challenged by the aforesated principle that an interpretation should be adopted that will render the whole agreement operative, 12 Am. Jur. 774. This interpretation by the two judges constituting the majority is not supported by the opinion of the dissenting judge, Judge Burger, in the same case. It is at variance with the interpretation put on the contract by the National Labor Relations Board in the aforesated case, and by the three judges of the Sixth Circuit that decided this case under review. This interpretation is also at variance with the reasoning of the Fourth Circuit in United Construction Workers et al vs. Haislip Baking Company, 223 Fed. Rep. (2d) 872, and with the reasoning of the First Circuit in W. L. Mead, Incorporated vs. International Brotherhood of Teamsters, 230 Fed. Rep. (2d) 576, and in which cases similar clauses were considered.

The petitioners also rely upon N.L.R.B. vs. Lion Oil Co. 352 U.S. 282. The issue was not similar in that case. That case involved the construction of Section 8(d) of the Labor Management Relations Act and the right of the Union to strike pending the modification of the contract itself. This is not the issue in this case.

CONCLUSION

For the foregoing reasons your respondent submits that

the decision of the Sixth Circuit on the question involved was sound and correct and should be upheld by this Court and that this case should be remanded for a redetermination of damages in accordance with the views expressed by the Sixth Circuit.

Respectfully submitted,

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PETITIONERS' REPLY BRIEF

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. 19

**UNITED MINE WORKERS OF AMERICA, AND UNITED MINE
WORKERS OF AMERICA, DISTRICT 28, Petitioners,**

v.

BENEDICT COAL CORPORATION, Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT**

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 19

UNITED MINE WORKERS OF AMERICA, AND UNITED MINE
WORKERS OF AMERICA, DISTRICT 28, *Petitioners,*

v.

BENEDICT COAL CORPORATION, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

FOREWORD

Petitioners will not attempt herein to reply *seriatim* to the arguments found in the brief of Benedict Coal Corporation.¹ Petitioners submit that the answers thereto are contained in their original brief; but Petitioners herein direct the Court's attention to basic and crucial fallacies appearing in Benedict's brief and in the Sixth Circuit's Opinion.

ARGUMENT

1.

Benedict admits (Br. 3) that the disputes which the Sixth Circuit held required processing under the griev-

¹ Herein Benedict Coal Corporation will be referred to as "Benedict".

ance machinery procedures of the Agreement were settled; but it complains that, "In all cases except the water strike Benedict tried to *arbitrate*² and they were turned down" (Br. 3). Therein lies a crucial fallacy in Benedict's position. The Agreement neither required nor contemplated that every dispute would or should be arbitrated. To the contrary, the settlement of disputes section (the grievance machinery procedures) enumerated several steps in the processing of settling disputes (R. 104a-5a). Arbitration was one of such steps and the *last* of them. The procedures expressly contemplated by the Agreement were that through bargaining the parties would undertake to effect a settlement short of the last step of arbitration. That is what Benedict had agreed to as a signatory to the Agreement; and in the instant case arbitration was obviated because the disputes were settled under the enumerated steps preceding arbitration.

2.

Benedict contends the rescission of the "no strike" and kindred clauses in the 1947 Agreement and the 1950 Agreement did no more than "merely [put] the parties in the same position as though there had been no previous 'no strike' clauses" (Br. 3-4, 5, 13-15). If Benedict means thereby that the bargaining history in the bituminous coal industry is to be ignored in the matter of interpreting the meaning of the Agreement, then of course Petitioners disagree therewith. Furthermore, Benedict's argument overlooks the fact and legal principle that in the absence of any waiver of the right to strike, such right exists, totally and unequivocally except as Congress has restricted such right in the Taft Hartley Act. Since Benedict points to Section 301 as authority for the instant action, Congress' mandate that

² Emphasis supplied.

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."³

is meaningful, as is the teaching of this Court in *NLRB v. Lion Oil Co.*, 352 U. S. 282, 293 (1957), that absent an express waiver, a waiver of the right to strike "is not to be inferred".⁴

Thus, it is manifest that the rescission of "no strike" and kindred clauses in the 1947 and 1950 Agreements must be interpreted in the light of the congressional policy above noted, the judicially-recognized and declared right to strike, and this Court's negation of judicial authority in the absence of an express waiver to infer a waiver of such right in such circumstances. When so interpreted, Benedict's denial and challenge (Br. 3-4, 5, 13-15) that the 1950 Agreement by affirmative recitals made it positive that a strike or work stoppage was no longer a violation of the collective bargaining agreement are shown to be clearly erroneous.

The Sixth Circuit itself rejects Benedict's argument. It specifically recognized that "the 'no strike' provisions of the previous contract were superseded" (R. 764) and that the right to strike "was expressly preserved in the 1950-52 agreement" (R. 766); but it further—and erroneously—declared that such right "was preserved with respect to all disputes not subject to settlement by other methods made exclusive by the agreement". Since the Agreement did not so recite, and since the earlier no-strike and related covenants had been totally and unequivocally rescinded, it is obvious that, to reach its con-

³ Section 13, Labor Management Relations Act, 1947 (29 USCA 163).

⁴ See also discussion in Petitioners' original brief, pp. 21-23.

clusion, the Sixth Circuit had to imply such a restriction. As noted, the no-strike and related covenants had been completely removed from the Agreement by affirmative recitals that they were rescinded and made null and void. With such clear and positive restitution of the right to strike, what justification could the Sixth Circuit have for implying something in the Agreement which the parties had specifically, positively, unequivocally and totally removed from the contract? In Petitioners' original brief (p. 23), they pointed out that in implying a covenant not to strike the Sixth Circuit had violated the rule which prohibits a tribunal from reforming and emasculating a contract so as to have it "conform to" its "idea of correct policy" as well as the principle which interdicts the right of a court to imply terms which "are inconsistent with express provisions".⁵ This Court has declared that "an express contract speaks for itself and leaves no place for implications". *Klebe v. U. S.*, 263 U. S. 188, 192. The Tenth Circuit expressed the rule in *Shell Petroleum Corp. v. Shore*, 10 Cir., 72 F. 2d 193, 195 (1934), in this fashion:

"An 'implied obligation' is one reasonably inferred from the circumstances or acts of the parties. No such obligation can be inferred or implied if it is in conflict with a provision of an express contract. In such circumstances the existence of an implied provision is conclusively rebutted."

Accord: *Hawkins v. U. S.*, 96 U. S. 689; *United States of America v. Ahearn*, 9 Cir., 231 F. 2d 353, 356 (1955); *Refinery Employees' Union v. Continental Oil Co.*, DC, W.D. La., 1958, 160 F. Supp. 723, 731.

⁵ Authorities cited are *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U. S. 355, 363; 12 Am. Jur., Contracts, Section 239, pp. 767-8; *Ferroline Corp. v. General Aniline & Film Corp.*, 7 Cir., 207 F. 2d 912, 926.

In its brief, Benedict does not deny the validity of Petitioners' argument.

Other changes in the 1947 and 1950 Agreements proclaim the Sixth Circuit's error and the invalidity of Benedict's contentions.

Under the "Settlement of Disputes" section of the 1941 and 1945 contracts, it was expressly provided that "Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute" (R. 124a). In addition, the "Illegal Suspension of Work" section of the earlier contracts also provided that "A strike or stoppage of work on the part of the Mine Workers shall be a violation of this Agreement" and that "Under no circumstances shall the Operator discuss the matter under dispute with the Mine Committee or any representative of the United Mine Workers of America during suspension of work in violation of this Agreement" (R. 125a).

The spectre of damage actions sanctioned by the Act's Section 301 resulted in changes in the 1947 Agreement which were continued in the 1950 Agreement. The provision which barred strike activity during the hearing of disputes was omitted from the grievance procedure provisions of the 1947 and 1950 Agreements. An operator could no longer look at the provisions for settling disputes and assert that a contractual obligation (namely, that pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute) had been violated and that such breach warranted a damage action.

By express language found in the 1947 and 1950 Agreements, the "Illegal Suspension of Work" clauses above noted were "rescinded, cancelled, abrogated and made null and void" (R. 106a). Thus, signatory operators could no longer point to such clauses and assert that thereby

strike activity would be a contract violation. Nor could the operator refuse to discuss a dispute, for not only had the proscription against his so doing been cancelled but the parties agreed that "any and all disputes, stoppages" should be determined exclusively by grievance machinery procedures (R. 106a), thereby requiring signatory operators to participate in the settlement of disputes; but in this connection and significantly there had been removed from such procedures the covenant that pending such procedures there would be no strike activity.

Thus, what the parties specifically deleted from the grievance procedures, namely, that pending settlement of disputes there would be no strike activity, the Sixth Circuit, by its interpretation and by implication, has read back into the Agreements. Had the parties intended to do that which the Sixth Circuit has proclaimed, there would have been no need to remove the deleted covenant from the Settlement of Disputes section. The result of the Sixth Circuit's holding is to restore into the contract by implication, contrary to the cases heretofore noted, that which the contracting parties specifically deleted from it. And, it is noteworthy that in reaching its erroneous conclusion, the Sixth Circuit avoided any consideration of these deletions.

In light of the Unions' purpose to rid themselves of contractual obligations not to engage in stoppages and thus avoid damage actions sanctioned in Section 301 for breach of such obligations, the Sixth Circuit's conclusion thwarts and frustrates that purpose and repudiates the contracting parties' intention clearly mirrored by their agreement that the no strike and related covenants were rescinded and that the requirement of working pending

the settlement of disputes was no longer a contractual obligation.

Both the Sixth Circuit and Benedict in its brief (p. 8, 10) indulge in the bald error that a strike is an *alternative* procedure to settle a dispute. Actually, a strike, which has been juridically defined as a lawful economic instrument, does not of itself resolve disputes. As said in *W. L. Mead, Inc. v. Int. Bro. of Teamsters*, DC, Mass., 1954, 126 F. Supp. 466, 467, "... a strike never 'adjudicates' anything." Rather, settlement of disputes is achieved through the process of collective bargaining and that is precisely what occurred in the instant case when the disputes were settled in accordance with the grievance machinery procedures. As Petitioners have asserted in their original brief (p. 23), it is one thing to agree to process disputes under the grievance machinery provided for in the contract. It is an entirely different matter to say that thereby there is a covenant not to resort to strike activity pending settlement under such machinery. In *Textile Workers Union of America v. NLRB*, DC Cir., 227 F. 2d 409, 410, it is said:

"There is not the slightest inconsistency between genuine desire to come to an agreement and use of economic pressure to get the kind of agreement one wants."

When it was the parties' intention, as plainly expressed in the 1941 and 1945 Agreements, to interdict stoppages pending dispute settlements under the grievance procedures, the parties demonstrated that they knew how to effectuate such intention in clear and positive language. The very fact that the earlier contracts proscribed strike activity pending settlement procedures

* Benedict complains (Br. 6, 9, 13) of the use of strikes to settle disputes or enforce demands.

sustains the distinction and that the Agreements' signatories recognized it. Had operators intended that grievance machinery procedures, should preclude strike activity pending settlement thereunder, there would have been no reason for the covenant not to strike pending settlements in the earlier contracts. Having deleted that requirement in contracts beginning in 1947 when Section 301 was enacted, its absence is a positivism that the result reached by the Sixth Circuit was not the intent of the Agreement's signatories and, particularly so, in light of the Unions' reasons and purposes for changing the terms of the bargaining agreements, already referred to herein (*ante*, p. 5) and in Petitioners' original brief (pp. 15-17). Nor does the word "exclusively" used in subsection 3 detract from the foregoing argument. In the absence of grievance procedures to solve disputes arising under the bargaining contract, settlement thereof could involve costly and lengthy court litigation. Realizing the large number of disputes that arise under a collective bargaining agreement, involving numerous employees, signatories to the Agreement sought some practical method short of recourse to the courts whereby disputes, stoppages, suspensions of work, etc., should be settled. To assure that settlement would be in accordance with the grievance procedures, rather than through court action, the signatories employed the word "exclusively".

To sustain the Sixth Circuit's erroneous holding based upon faulty reasoning, Benedict points (Br. 9-11) to the rule that requires all provisions of a contract to be read as a whole and so interpreted as will render the whole agreement operative. Petitioners agree with the rule.

but the implementation of that rule does not justify a distortion of the agreement which the parties themselves have reached. Certainly it does not harmonize the total and unequivocally complete cancellation of the no strike clauses which the Sixth Circuit agrees preserved the right to strike with its contradictory conclusion that it was not preserved as to disputes which fell within the scope of the grievance machinery. See *International Union, UMW v. NLRB*, DC Cir., 257 F. 2d 211, 217. The Sixth Circuit declared that it was "spontaneous" or "wildcat" strikes that the agreement made subject to the settlement procedures (R. 767), despite the contract's language that "all disputes, stoppages" were to be settled thereunder (R. 129a). Moreover, petitioners insist that not only is the contract to be read in its entirety, they insist that in determining the meaning of the contract and the intention of the signatories thereto, the language of previous collective bargaining agreements and the changes effected in the 1947 and 1950 Agreements, both in the affirmative recitals therein and the matters which the signatories purposefully and deliberately omitted therefrom, as well as the reasons therefor and the purposes sought to be achieved because of Congress' adoption of the Act's Section 301, must be considered since necessarily they give basic content to the meaning of the language under scrutiny. Neither the Sixth Circuit in its opinion nor Benedict in its brief concerned itself with such pertinent indicia and factors. Contrariwise, the District of Columbia Circuit, in its interpretation of the 1952 Agreement, found the " 'legislative history' of the agreement in question . . . interesting and enlightening", and declared that from the bargaining history "must be

deduced the meaning of the contract". *International Union, UMW v. NLRB*, DC Cir., 257 F. 2d 211, 217.^o

3.

Abortive too is Benedict's assertion, not adopted by the Sixth Circuit, that "The interpretation which the parties themselves have put upon the 1950 contract indicates that strikes for dispute settling purposes were considered violations of the contracts" (Br. 5, 11). Benedict points (Br. 11-12) to a letter directive dated October 24, 1951, from the UMW officers to members, committeemen and officers of local unions which expresses UMW's policy concerning unauthorized strikes. Therein UMW officers complained of unauthorized strikes because, *unlike the instant case*, the grievance machinery procedures of the contract were not invoked (Ex. 31, R. 499a-501a). UMW urged "all members, local union officers and committeemen, district and international

^o In seeking to dissipate the effectiveness of *International Union, UMW v. Board*, *supra*, Benedict (Br. 15) states the District of Columbia Circuit "gave no effect to subdivision 3 of the miscellaneous clauses of the 1950 agreement and termed it a mere 'gentleman's agreement'". Actually that portion of the Court's opinion was concerned with subsection 3 of the Miscellaneous section of the 1952 Agreement. The National Labor Relations Board had urged that the covenant in that subsection "to maintain the integrity of the contract" was meaningless unless read as an undertaking to use the contract machinery, and no other method, as the means of resolving disputes. The Court interpreted the language to be a "gentleman's agreement" that the desirable way to settle disputes was by use of the grievance machinery and that the Union's responsible officials would do their best to see that that procedure was followed and would put such pressure as seemed to them to be wise and likely effective upon Union members to induce or coerce them from striking. It said, "It is likely that the agreement has been of great benefit to the operators and the union and that most disputes have been resolved by the use of the grievance machinery" (257 F. 2d 218), which is what occurred in the situations depicted in the instant record. Further, neither the Sixth Circuit's opinion nor the District Court's charge (R. 729a) used the "integrity" clause as a basis for holding Petitioners liable.

officials to not only refrain from participation in these unauthorized strikes, but to use their efforts and influence to prevent occurrence of said unauthorized strikes *in contravention of the International Constitution and in direct opposition to the established policies of the United Mine Workers of America*". It is pertinent, Petitioners submit, that the directive does not state such unauthorized strikes are in contravention of the collective bargaining agreement.

CONCLUSION

• For the reasons set forth herein and those which are set forth in Petitioners' original brief, Petitioners submit that they are entitled to the relief sought in such original brief.

Respectfully submitted,

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